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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

J.P. MORGAN CHASE & CO., *et al.*,

Petitioners,

v.

THE RETIREMENT SYSTEMS OF ALABAMA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the bar imposed by 28 U.S.C. §§ 1334(d) and 1452(b) on this Court's review of orders to abstain and remand, or not to abstain, in actions removed from state court on the ground that they fall within federal bankruptcy jurisdiction violates the Exceptions Clause of Article III of the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners:

J.P. Morgan Chase & Co.; J.P. Morgan Securities, Inc.; Citigroup Inc.; Citigroup Global Markets Inc. (f/k/a Salomon Smith Barney Inc.); Bank of America Corporation; and Banc of America Securities LLC.

Respondents:

The Retirement Systems of Alabama, consisting of: The Employees Retirement System of Alabama; The Teachers Retirement System of Alabama; The Public Education Employees' Health Insurance Fund; The Public Employees Individual Retirement Account Fund; The Clerks' And Registers' Supernumerary Fund; The Wildlife And Freshwater Fisheries Fund; The Alabama Cultural Resources Preservation Trust Fund; and The Alabama Trust Fund.

The following party was also an appellant in the Eleventh Circuit, but is not a petitioner in this petition, and is being served as respondent herein:

Bernard J. Ebbers

RULE 29.6 STATEMENT

Petitioner J.P. Morgan Chase & Co., a publicly held company, is the parent of Petitioner J.P Morgan Securities, Inc. No other publicly held company owns 10% or more of the stock of Petitioner J.P. Morgan Securities, Inc.

Petitioner J.P. Morgan Chase & Co. has no parent and no publicly held company owns 10% or more of its stock.

Petitioner Citigroup Inc., a publicly held company, is the parent of Petitioner Citigroup Global Markets Inc. (f/k/a Salomon Smith Barney Inc.). No other publicly held company owns 10% or more of the stock of Petitioner Citigroup Global Markets Inc.

Petitioner Citigroup Inc. has no parent and no publicly held company owns 10% or more of its stock.

Petitioner Bank of America Corporation, a publicly held company, is the parent of Petitioner Banc of America Securities LLC. No other publicly held company owns 10% or more of the stock of Petitioner Banc of America Securities LLC.

Petitioner Bank of America Corporation has no parent and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Eleventh Circuit dismissing the appeal for lack of jurisdiction, *Retirement Systems of Alabama v. J.P. Morgan Chase & Co.*, No. 02-15385 (11th Cir. June 18, 2003), is set forth in Appendix A beginning on page 1a.

The opinion and order of the United States District Court for the Middle District of Alabama denying Defendants-Petitioners' motion to stay and granting Plaintiffs-Respondents' motion to remand, *Retirement Systems of Alabama v. J.P. Morgan Chase & Co.*, No. CV-02-A-898-N (M.D. Ala. Sept. 24, 2002), is reported at 285 B.R. 519 and is set forth in Appendix B beginning on page 4a.

JURISDICTION IN THIS COURT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the Eleventh Circuit's order dismissing the appeal for want of appellate jurisdiction, which order was entered June 18, 2003.

Pursuant to 28 U.S.C. § 2403(a), this petition shall be served on the Solicitor General of the United States in accordance with Supreme Court Rule 29.4(b). Pursuant to 28 U.S.C. § 2403(b), the United States Court of Appeals for the Eleventh Circuit certified to the Attorney General the fact that the constitutionality of an Act of Congress had been drawn into question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions involved are: U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1334; and 28 U.S.C. § 1452. These provisions are set forth in Appendix C beginning at page 30a.

STATEMENT OF THE CASE

Background

Petitioners respectfully request that this Court examine the constitutionality of a statute that absolutely forbids it from reviewing a class of decisions by district courts, including decisions regarding the propriety *vel non* of comity-based abstention from the exercise of federal bankruptcy jurisdiction and remand.[1] The federal district courts have been issuing contrary rulings on this subject, even in the face of cases presenting identical circumstances. The statutes in question here leave no mechanism for correcting legal error in these decisions. The resulting uncertainty in the law impairs the development of legal doctrine, undermines confidence, and, as in the instant case, hampers the rational administration of multidistrict litigation.

In June 2002, WorldCom, Inc. ("WorldCom") announced that it intended to restate its historical financial statements because, among other things, it had improperly treated more than $3.8 billion in ordinary costs as capital expenditures. Numerous private securities actions were filed in the wake of this and subsequent announcements by WorldCom concerning its financial state. Though many actions have been brought by alleged purchasers of WorldCom stock, a large number, including the action underlying this petition, have been commenced by individual plaintiffs who have based their actions on allegations concerning WorldCom debt ("Bondholder Actions"). (A list of Bondholder Actions commenced to date is set forth in Appendix D beginning on page 33a.) By and large, the latter group of plaintiffs, among other things, claim purchases of debt securities in two offerings, in May 2000 and May 2001, as a result of which WorldCom issued over $ 15 billion worth of securities.

1. The Petitioners' submission of this petition is not intended to waive any objections they may have to assertion of personal jurisdiction by the district court or state court. *See, e.g., Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 409 (1929).

To date, sophisticated institutional investors have commenced more than four dozen Bondholder Actions in state courts scattered across the country. Though displaying a preference for state court, almost all Bondholder Actions, this action included, seek relief under the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77a, *et seq.*; indeed, most such actions set forth claims *solely* under the Securities Act. This litigation strategy is carefully calibrated. The Securities Act allows for concurrent jurisdiction and has a general anti-removal provision that bars ordinary federal question removal. *See* 15 U.S.C. § 77v(a). These circumstances have led the transferee court designated by the Judicial Panel on Multidistrict Litigation ("JPML") to oversee the sprawling WorldCom litigation to observe that, by asserting federal claims only under the Securities Act, the institutional investor plaintiffs aim to avoid litigation in federal court and to ensure that the actions proceed in the multiple state jurisdictions in which they have been commenced. *See In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 315-16 (S.D.N.Y. 2003).

Though the Bondholder Actions have been filed in multiple state court jurisdictions, the complaints are substantially similar – in many cases, aside from the identities of the plaintiffs, they are more or less identical. The named defendants by and large consist of past and present WorldCom officers and directors, Arthur Andersen LLP ("Andersen"), WorldCom's former auditor, and others such as the Petitioner bank holding companies and investment banks. The allegations are that (i) WorldCom's financial statements were materially false and misleading; (ii) Andersen improperly certified the financial statements, which were incorporated into various public statements, including registration statements and prospectuses issued in connection with certain WorldCom debt offerings; (iii) the debt securities were issued under or are traceable to the aforementioned literature; and (iv) at the time of the debt offerings, Petitioners and others knew or should have known that the financial statements were materially false and misleading.

The substantial overlap in the subject matter of the litigation spawned by WorldCom's disclosures prompted parties to file motions with the JPML seeking centralization. The first motions were filed in July 2002. The JPML scheduled argument on this subject for its September 26, 2002 sitting.

On July 21, 2002, WorldCom filed a voluntary petition for bankruptcy relief in the Southern District of New York. An automatic stay of all securities litigation against WorldCom ensued. *See In re WorldCom*, 293 B.R. at 313. With WorldCom in bankruptcy, Petitioners (among others) removed the dozens of Bondholder Actions under the authority of 28 U.S.C. § 1452(a) and notified the JPML of the existence of these "tag along" actions. *See* J.P.M.L. R. 7.4. The grounds for removal were that the actions are "related to" the WorldCom bankruptcy by virtue of, among other things, contractual indemnification and statutory contribution rights that Petitioners and others have as against WorldCom. The underwriting agreements entered into in connection with the debt offerings at issue provide for reimbursement by WorldCom both for current costs and expenses incurred in connection with defending the Bondholder Actions and for any ultimate liability. As the removals were being effectuated, Petitioners also moved the district courts for stays pending a decision by the JPML on the transfer of each removed action.

On October 8, 2002, the JPML ordered the WorldCom cases transferred to the Honorable Denise Cote of the United States District Court for the Southern District of New York. *See In re WorldCom*, 293 B.R. at 312. Ever since the JPML's October 8 ruling, numerous Bondholder Actions – both those pending at the time of the JPML's ruling and actions commenced in the months thereafter – have been transferred to Judge Cote, with most transferor district courts entering stays and, thereby, allowing the multidistrict litigation process

to take its course. *See*, *e.g.*, *id.* at 313-14. Thus far, in no case where the JPML actually has had occasion to rule on the propriety of a final transfer of a Bondholder Action has it declined the invitation to transfer.

Even so, plaintiffs in virtually every Bondholder Action have filed remand motions in the potential transferor courts. As may be expected given the circumstances of the WorldCom litigation, these motions are virtually identical. Accordingly, in their motions for a stay, Petitioners and other defendants have submitted that a stay by the transferor court pending transfer by the JPML is necessary in part because of the importance of avoiding potentially inconsistent decisions on identical jurisdictional questions in this multidistrict litigation.

But consistency has not been achieved because some potential transferor courts have decided not to stay their hand. On September 24, 2002, two days before the JPML's scheduled hearing on the WorldCom matters, the district court below became the first court to reach the merits of a remand motion in a Bondholder Action. Declining definitively to rule on whether federal "related to" bankruptcy jurisdiction was proper, the district court elected to abstain from its exercise.

On March 3, 2003, Judge Cote, to whom the JPML had transferred the cases, issued an Opinion and Order denying an omnibus motion brought by plaintiffs in one Bondholder Action – joined by over forty other plaintiffs from multiple other Bondholder Actions – to remand their actions to state court. Judge Cote held that federal jurisdiction was proper because, at the very least, defendants' statutory contribution rights satisfied the "conceivable effect" test, *see Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), *overruled on other grounds*, *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), for establishing "related to" bankruptcy

jurisdiction. *See In re WorldCom*, 293 B.R. at 319, 321. Judge Cote then held that abstention from assertion of federal jurisdiction was unwarranted, particularly because plaintiffs had set forth federal securities laws claims. *Id.* at 333-34.

Thus, district courts have reached diametrically opposed conclusions on the very same question of whether it is appropriate to exercise federal jurisdiction relating to the WorldCom bankruptcy. Moreover, and particularly since Judge Cote's order, an increasing number of Bondholder Actions have been filed, and plaintiffs in these actions, relying heavily on the lower court's ruling, urge the potential transferor district courts to dissent from Judge Cote's decision. Some transferor courts have expressly declined such invitations, either by staying the actions pending transfer or, following Judge Cote, by actually issuing rulings denying the motions to remand. But not all courts have followed this course. To date, two district courts have emulated the district court below in holding that abstention is proper.[2] Two other district courts have remanded on grounds of lack of subject matter jurisdiction or improper removal.

Proceedings in the District Court

Respondents originally commenced this action in Alabama state court based upon their alleged purchase of WorldCom debt securities in WorldCom's May 2000 and May 2001 offerings. Their complaint, as amended, asserts claims

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2. *Compare Carpenters Pension Trust for S. Cal. v. Ebbers*, No. CV 03-04878 CBM (MCX), 2003 WL 22098022, at *2-*4 (C.D. Cal. Sept. 9, 2003) (declining to abstain and remand on equitable grounds); *Pac. Life Ins. Co. v. J.P. Morgan Chase & Co.*, No. SA CV 03-813 GLT (ANX), 2003 WL 22025158, at *2 (C.D. Cal. June 30, 2003) (same), *with Ill. Mun. Ret. Fund v. Citigroup, Inc.*, Civ. No. 03-465-GPM, slip. op. at 5 (S.D. Ill. Sept. 9, 2003) (abstaining and remanding); *Tenn. Consol. Ret. Sys. v. Citigroup, Inc.*, No. 3:03-0128, slip. op. at 6-7 (M.D. Tenn. May 9, 2003) (similar).

against Petitioners and others under Sections 11, 12 and 15 of the Securities Act, 15 U.S.C. §§ 77k, 77l, 77o, and under Alabama state securities and common law. Petitioners timely removed the action to the United States District Court for the Middle District of Alabama under 28 U.S.C. § 1452(a) on the ground that federal subject matter jurisdiction is premised upon "related to" bankruptcy jurisdiction. *See* 28 U.S.C. § 1334(b).

On August 9, 2002, Respondents moved to remand or abstain, relying largely on *Retirement Systems of Alabama v. Merrill Lynch & Co.*, 209 F. Supp. 2d 1257 (M.D. Ala. 2002), a case arising out of the financial demise of Enron Corporation, in which Respondents also were plaintiffs and also had asserted Securities Act claims. The *Merrill Lynch* decision was authored by the Honorable W. Harold Albritton, the district court to whom the instant case was assigned.

On August 13, Petitioners moved the district court for a stay pending the JPML's decision whether to transfer this and other Bondholder Actions to a multidistrict litigation transferee court. Petitioners cited to precedent such as *Gould v. National Life Insurance Co.*, 990 F. Supp. 1354 (M.D. Ala. 1998) (Albritton, C.J.), in which the district court previously had endorsed the principle that it is preferable for transferor courts to refrain from ruling on common questions, including questions of federal subject matter jurisdiction, when a potential transfer would permit a transferee court efficiently to decide the issue. *See id.* at 1358, 1363. Petitioners noted that, because all plaintiffs in the several removed Bondholder actions were moving for remand on virtually identical grounds, the risk of inconsistent decisions favored a brief stay.

Also on that day, the district court instructed Petitioners and the other defendants to "show cause why this case should not be remanded" for the reasons set forth in *Merrill Lynch*. Petitioners, as they had in their stay motion, stressed the need for a JPML transferee court to decide common issues,

including whether "related to" bankruptcy jurisdiction exists and whether the assertion of federal jurisdiction otherwise would be appropriate. More specifically with respect to the question of abstention, Petitioners argued that, given that "related to" jurisdiction properly could be asserted, the district court had a presumptive duty to exercise federal jurisdiction. Petitioners also submitted that there were no special circumstances counseling in favor of abstention.

On September 24, 2002, the district court issued an order abstaining from the exercise of federal jurisdiction and remanding the case. The stated grounds for abstention tracked those set forth in *Merrill Lynch*, a summary of which follows.

The plaintiffs in the *Merrill Lynch* action originally had been non-representative plaintiffs in a putative class action pending in the Eastern District of Texas before the Honorable Melinda Harmon, to whom the JPML had transferred Enron-related litigation. *Merrill Lynch*, 209 F. Supp.2d at 1260. Plaintiffs had moved the JPML to grant it status as an "advisory plaintiff," which motion was denied. At that point, with the actions still pending before Judge Harmon, the plaintiff opted out of the putative class and commenced the *Merrill Lynch* action in Alabama state court. Defendants removed the action under 28 U.S.C. § 1452(a). 209 F. Supp.2d at 1260.

On a motion to remand, the *Merrill Lynch* court concluded that it was uncertain as to whether federal subject matter jurisdiction existed. *Id.* at 1267, 1269. It nevertheless abstained for reasons of comity under the permissive abstention provision of 28 U.S.C. § 1334(c)(1), and remanded the action. *Id.* at 1269-70. The court offered five principal reasons for its comity-based abstention: (i) questions of state law predominated and there was no basis for federal jurisdiction other than bankruptcy; (ii) there were no "*per se*" bankruptcy

issues; (iii) the Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. § 77p(d)(2)(a), "evince[s] a policy of special respect for the forum choices of state pension plans with regard to securities claims and for state courts whose jurisdiction is invoked to hear them"; (iv) potential deprivation of the right to trial by jury if transfer were made to bankruptcy court; and (v) the court's own uncertainty as to the procedural propriety of removal and as to the existence of federal subject matter jurisdiction. 209 F. Supp. at 1268-69.

The *Merrill Lynch* case is significant not just because it drove the ruling below, but also because it demonstrates that the problem to which this petition speaks is recurring in nature. The WorldCom litigation has not been the only circumstance in which a decision of the lower court here on the question of abstaining from federal bankruptcy jurisdiction has come into conflict with a ruling of a JPML-designated transferee court. Judge Harmon, faced with issues in a removed action similar to those presented in *Merrill Lynch*, held both that the action was "related to" the Enron bankruptcy and that abstention from the exercise of federal bankruptcy jurisdiction was not warranted. *See In re Enron Corp. Sec. Derivative & ERISA Litig.*, Nos. MDL-1446, Civ. A. H-01-3624, Civ. A. G-02-0299, 2002 WL 32107216 (S.D. Tex. Aug. 12, 2002).[3]

Proceedings Before the Court of Appeals

Petitioners timely filed their notices of appeal to the United States Court of Appeals for the Eleventh Circuit. On October 6, 2002, Respondents moved to dismiss the

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3. For a discussion of the recurring nature of the underlying issues, *see* Jeffrey W. Kilduff, Elizabeth H. Baird & Robert M. Stern, *Commentary: Bondholders' State Securities Suits Pose New Threat to Wall Street*, 9 No. 5 Andrews Sec. Litig. & Reg. Rep. 18 (July 30, 2003).

appeal on the assertion that it was barred by the jurisdiction-stripping provisions of 28 U.S.C. §§ 1334(d) and 1452(b). On October 16, 2002, Petitioners timely filed an opposition, in which they first indicated that they intended to challenge the constitutionality of these statutory provisions purporting to strip appellate jurisdiction. Petitioners submitted that because these statutes forbid *all* review by this Court of decisions to abstain and remand, or not to abstain, when removal is based on 28 U.S.C. § 1452(a), these provisions violate the Exceptions Clause of Article III of the United States Constitution.

On October 23, 2002, the Eleventh Circuit instructed the parties to address the question whether the district court's order of abstention and remand was reviewable. Petitioners timely submitted their response and also filed a notice pursuant to 28 U.S.C. § 2403(a) and Federal Rule of Appellate Procedure 44 indicating that the constitutionality of an Act of Congress was being drawn into question. The Eleventh Circuit duly certified that fact to the Attorney General of the United States. The Eleventh Circuit instructed the parties to fully brief the appeal on the merits and thus ordered that Respondents' motion to dismiss the appeal would be carried with the case. The United States intervened to defend the constitutionality of the statutes.

On June 18, 2003, the Eleventh Circuit issued an order dismissing the appeal. The court of appeals held that appellate jurisdiction existed to review the challenge to the statutes' validity under the Constitution. On the merits of the constitutional question, the court of appeals stated: "Having carefully reviewed the briefs submitted by Plaintiff, the Defendants, and the United States, we conclude that the statutory bars to appellate review contained in §§ 1334(d) and 1452(b) are constitutional." *Retirement Sys. of Ala. v. J.P. Morgan Chase*, No. 02-15385, slip op, at 3 (11th Cir.

June 18, 2003) (citing *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513-14 (1869), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 104 (1869)). The court of appeals offered no further analysis or explanation.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for consideration of an important question, fundamental to the relations between this Court and the Congress, concerning the scope of Congress's authority to make exceptions and regulations to this Court's appellate jurisdiction. It cannot be gainsaid that Congress lacks plenary power to make exceptions to this Court's appellate jurisdiction; the existence of such power could imperil the institutional integrity of the federal judiciary. At the same time, this Court has recognized that Congress may remove from this Court's appellate jurisdiction certain "classes of cases." The statutes here at issue purport to forbid this Court from reviewing comity-based orders to abstain and remand, or not to abstain, from the exercise of federal bankruptcy jurisdiction in cases that have been removed pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452(a). These statutes thus rely on legal content to define the "class" of orders excepted from this Court's appellate jurisdiction. This petition raises the important question whether Congress may withdraw *completely* from this Court the ability to review a class of cases – together with the specific legal questions that they routinely encompass – by defining "class" in terms of its legal content.

Petitioners respectfully submit that Congress does not enjoy such authority. This conclusion is compelled by the text, structure and drafting history of Article III, together with fundamental considerations underlying the constitutional plan, wherein this Court was established to fulfill the essential function of serving as the guarantor of uniformity in the

interpretation of federal law. Exceptions drawn in terms of legal content imperil this essential function.

Although this Court has not had occasion to speak to the question raised by this petition, a recent statement concerning the scope of the Exceptions Clause supports the conclusion that foreclosure of *all* possibility of review of classes of cases, or orders, defined in terms of legal subject matter could violate Article III, § 2. *See Felker v. Turpin*, 518 U.S. 651, 661-62 (1996) (stating that an Exceptions Clause violation was not indicated where the statute "[did] not repeal [this Court's] authority to entertain a petition for habeas corpus"). Such an understanding of the Exceptions Clause comports also with certain of this Court's earlier statements on the subject. For example, this Court has noted its general approval of Congress's exercise of the exceptions power where either (i) all avenues for review of the particular legal issue(s) had not been foreclosed or (ii) Congress had crafted the exception in terms that essentially were neutral with respect to legal content. Examples of "law neutral" means of crafting exceptions include relying on amounts in controversy, ordinarily a question of fact, as the basis for determining whether a case qualifies for this Court's appellate jurisdiction. Defined in this manner, exceptions do not compromise this Court's function as guarantor of uniformity of federal law because, although the possibility of review of particular questions of federal law may not be available in *some* cases, the opportunity for reviewing those questions of law is not foreclosed in *every* case.

Practical effects further highlight the significance of the question presented by this petition. Statutes that completely curtail this Court's power to review particular questions of federal law would tend to proliferate and perpetuate doctrinal confusion and discordant rulings in the inferior courts. This concern has become a reality with the statutes at issue in this petition.

For instance, the allowance by 28 U.S.C. § 1334(c)(1) for a district court to "abstain" on grounds of "comity" refers to well-established judicially-created concepts. In this case, however, the district court's abstention analysis is materially at variance with settled doctrine. A factor that drove the lower court's decision to abstain was its supposition that comity was implicated by the general provision in the Securities Act that permits "State pension plans" to file actions either in federal or in state court, even though recent legislation has made certain class actions removable. But Congress's grant of concurrent jurisdiction for asserting federal causes of action has never been held by this Court to be a permissible ground for abstention. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-14 (1976) ("'It was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it.'") (quoting *Alabama Pub. Serv. Comm'n v. Southern R. Co.*, 341 U.S. 341, 361 (1951) (Frankfurter J. concurring)).

Thus, the disharmony in the outcomes of particular cases results not from discretion applied to variant circumstances, but from the lower courts' divergent views of the law informing their exercise of discretion. Doctrinal confusion, in turn, engenders the inconsistent application of law. Although there was no material difference in the arguments or factual circumstances presented to Judge Cote and Chief Judge Albritton on the question of abstention from federal jurisdiction, they nevertheless reached opposite conclusions because of fundamentally different views concerning what factors, as a matter of law, countenance abstention. Differing interpretations and applications of the law are a commonplace in the inferior federal courts. But what sets these circumstances apart from the norm is that there is no prospect for eventual correction or uniformity. The Constitution created this Court so that discord of this nature could be alleviated.

In addition to the significant institutional concerns stated above, the need for this Court's review here is indicated further by the importance of the subject matter that purportedly is foreclosed from this Court's appellate jurisdiction. The jurisprudence of abstention, established in significant rulings of this Court, finds its pedigree in important constitutional concerns underlying federalism. The doctrine assures the proper balancing of adjudicative authority between state and federal courts when matters concerning the states' sovereign prerogatives are implicated.

Being ultimately an exercise of a federal *court*'s informed discretion, it is imperative that authoritative pronouncements on this doctrine be made by the ultimate arbiter in the federal judiciary. The obvious significance of the abstention questions, particularly in light of the strong federal bankruptcy interest, in the past has occasioned the grant of certiorari by this Court to consider the propriety *vel non* of abstention in the context of bankruptcy-related litigation. *See Mangus v. Miller*, 317 U.S. 178 (1942); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940). Because such cases already have been deemed sufficiently important to command this Court's attention, this Court should assess the constitutionality of statutes that now forbid that review.

ARGUMENT

I. The Jurisdiction-Stripping Provisions of 28 U.S.C. §§ 1334(d) and 1452(b) Violate Article III Because They Define the Class of Cases Excepted From This Court's Appellate Jurisdiction in Terms of Legal Content and Forbid All Access to Review by This Court

In pertinent part, 28 U.S.C. § 1334(d) provides that "[a]ny decision to abstain or not to abstain" made in a case over which there is bankruptcy jurisdiction "is not reviewable

by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title." The jurisdiction-stripping language of section 1452(b), which concerns the specific context of bankruptcy removal, is the same. *See* 28 U.S.C. § 1452(b). The plain import of these statutes confirms that they foreclose *any* review by this Court of a class of decisions by inferior Article III courts, which encompass the comity-based abstention and remand order issued in this case.

The statutes thus feature two attributes, which, in combination, render these jurisdiction-stripping provisions highly unusual. First, the bar to this Court's review is complete. Review by way of 28 U.S.C. § 1257 is not possible because remand orders, being orders entered by a federal court, are not subject to review from the final decision of a state court of last resort. Consequently, the statute's foreclosure of appeals by way of this Court's certiorari jurisdiction, *see* 28 U.S.C. § 1254, blocks all avenues of redress in this tribunal.

Second, the statutes define the class of orders they affect in terms of their legal content. As a result, the inferior Article III courts' pronouncements on legal questions typical of this class of decisions – specifically including the comity-based abstention from exercising federal bankruptcy jurisdiction in this case – have become shielded from this Court's scrutiny. When Congress thus fashions exceptions to this Court's appellate jurisdiction, it transgresses its authority.

In cases implicating the meaning of Article III, this Court has expressed vigilance against the danger that a "provision of law 'impermissibly threaten[] the institutional integrity of the Judicial Branch.'" *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)). To determine

the constitutionality of a provision affecting the scope of power enumerated under Article III, reference is made to the "purposes underlying the requirements of Article III," which "inquiry, in turn, is guided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application'" of that article. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847-48 (1986) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985)). Examination of the purposes that compelled the creation of this Court indicates that the statutes here impermissibly threaten the institutional integrity of the Judicial Branch.

The Framers established a *unitary* Supreme Court to serve as ultimate arbiter over differences of opinion on questions of federal law. *See* The Federalist No. 81, at 450 (Alexander Hamilton) (Isaac Kramniek ed., 1987) (observing that the fact "[t]hat there ought to be one court of supreme and final jurisdiction is a proposition which has not been, and is not likely to be, contested"); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (describing hierarchical character of the federal judiciary as described in Article III, under which "the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole"). A court possessed of "a general superintendance" and "authorised to settle and declare in the last resort, an uniform rule of civil justice" was deemed necessary "[t]o avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories." The Federalist No. 22, at 182 (Alexander Hamilton).

This Court approvingly has echoed the Framers' purpose on several occasions. For example, it stated through Justice Story that:

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a

> treaty of the United States, or even the Constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816); *see also Ableman v. Booth*, 62 U.S. (21 How.) 506, 518 (1858) (stating that it is essential to the very existence of the government of the United States "that a tribunal should be established" that would "finally and conclusively" decide all federal questions so that "uniformity of judicial decision[s]" and federal supremacy may be maintained); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821) (Marshall, C.J.) (similar).

The hierarchical setting of the Judicial Branch is essential to its proper function. Distortions of that structure, even if seemingly concerned only with trifling matters, constitute an impermissible encroachment into the province of the judiciary. *Cf. Morrison v. Olson*, 487 U.S. 654, 709-10 (1988) (Scalia, J., dissenting); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring) (observing that the "accretion of dangerous power" results from "the generative force of unchecked disregard of the restrictions that fence in even the most

disinterested assertion of authority"). The statutes here distort the structure that Article III envisions. This Court cannot successfully perform its essential functions of guaranteeing the uniformity of federal law if Congress excepts from its appellate jurisdiction classes of cases or orders issued by inferior Article III courts defined in terms of their particular legal content. An expansive understanding of the exceptions power, a noted scholar has observed, would authorize "exceptions which engulf the rule" and result in "reading the Constitution as authorizing its own destruction." *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1364-65 (1953); *see also* Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 168-69 (1960).

Although the particular question posed in this petition has never been squarely addressed in this Court's decisions, and although this Court's pronouncements on the general subject sometimes are difficult to reconcile, precedent supports the conclusion that Congress cannot foreclose this Court's ability to review classes of federal cases or orders issued by Article III courts based on their legal content. For example, in *Felker v. Turpin*, 518 U.S. 651 (1996), this Court, through the Chief Justice, stated that, although the Antiterrorism and Effective Death Penalty Act of 1996 had foreclosed certain avenues of this Court's review of habeas corpus petitions, because "it [did] not repeal [the Court's] authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2." 518 U.S. at 661-62. Thus, this Court suggested that, if its authority to entertain such a petition had been curtailed, there could be a claim that the Exceptions Clause had been violated. The concurring opinion of Justice Souter emphasized this very point. *See id.* at 667 (Souter, J., with whom Stevens and Breyer, JJ., joined, concurring) (noting that, had the legislation foreclosed all manner of review, "the question

whether the statute exceeded Congress's Exceptions Clause power would be open").

The statements in *Felker* recall a suggestion made over a century before in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). The question was whether Congress had the power to except from this Court's appellate jurisdiction appeals pending from circuit courts in habeas corpus actions. Congress had authorized this particular means of bringing habeas corpus cases to this Court's attention by legislation enacted only a year before. This Court upheld the constitutionality of the jurisdiction-stripping statute. Significantly, however, it added:

> Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

Id. at 515. This last statement implied that Congress had not overstepped its exceptions power because all avenues by which habeas corpus petitions could be presented to this Court had not been foreclosed.

The following year, this Court addressed the observation that concluded its decision in *Ex parte McCardle*, namely, whether the jurisdiction-stripping provisions of the legislation at issue in that case precluded this Court from issuing a writ of habeas corpus under the Judiciary Act of 1789. *See Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869). Holding that it did not, *see id.* at 104-06, this Court confirmed its observation in *Ex parte McCardle* that the enactment of 1868 did not "affect the jurisdiction which was previously exercised." Given that

the power to review habeas corpus petitions was considered to fall within this Court's *appellate* jurisdiction, *see Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-01 (1807), the enactment at issue in *Ex parte McCardle* did not qualify as an exception to the entirety of this Court's appellate jurisdiction to review habeas corpus petitions. Significantly, in support of its holding, this Court explained:

> [I]t is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. In the particular class of cases, of which that before the court is an example, when the custody to which the prisoner is remanded is that of some authority other than that of the remanding court, it is evident that the imprisoned citizen, however unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the appellate jurisdiction of this court.

Ex parte Yerger, 75 U.S. (8 Wall.) at 102-03. Although the context is different, these same basic principles apply here, as well.

In light of this precedent, the reliance by the court of appeals below on *Ex parte McCardle* and *Ex parte Yerger* to uphold the subject statutes cannot be sustained. Indeed, the Eleventh Circuit's predecessor once recognized that the circumstances of those cases did not involve foreclosure of all avenues of appeal. *See King v. Finch*, 428 F.2d 709, 712 n.4 (5th Cir. 1970) (noting that "the Act at issue in *McCardle*

foreclosed only one avenue of approach to the Supreme Court").

That Congress may not foreclose all avenues of appeal to this Court in certain classes of cases is not to say that Congress's exceptions authority is non-existent. Congress has excepted "classes of cases" from this Court's review with this Court's blessing. In these cases, however, it does not appear that this Court ever specifically has held that foreclosure of review based on legal content is a valid exercise of Congress's exceptions power.

Generally, it appears that this Court has sanctioned Congress's exercise of the full extent of the exceptions power only where the "classes of cases" either (i) were drawn in terms neutral with respect to legal content or (ii) involved exceptions as to reviewing issues of fact. Such exceptions ordinarily cannot be said to violate Article III because they do not compromise this Court's ability to exercise its essential functions of maintaining the uniformity of federal law.

An early example of such a pronouncement appears in *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810), where this Court indicated that Congress permissibly could preclude writs of error from reaching this Court in cases presented with matters in controversy less than $2,000. *See id.* at 314. Defining exceptions in terms of amounts-in-controversy represents an attempt to define a "class" of cases in terms of a factual determination, not its legal content. Ordinarily, then, such line-drawing ought not, at least on its face, indicate a problem under the Exceptions Clause.

Other decisions have upheld restrictions in this Court's ability to review findings of fact. The question in *The 'Francis Wright'*, 105 U.S. 381 (1881), for example, was whether Congress properly could limit this Court's review of

admiralty cases to questions of law arising on the record. *See id.* at 384; *see also Luckenbach S.S. Co. v. United States*, 272 U.S. 533, 537-40 (1926) (addressing similar issue and relying on analysis of *The 'Francis Wright'*). This Court responded in the affirmative. *See The 'Francis Wright'*, 105 U.S. at 385-86. Again, on its facts, *The 'Francis Wright'* would not present an Exceptions Clause problem; the exception at issue there preserved this Court's essential function of being the ultimate expositor on questions of federal law. Restrictions on reviewing questions of fact comport with this Court's role as an appellate tribunal, the principal purpose of which is to focus on correcting errors of law.

To be sure, this Court's precedent sometimes contains sweeping language concerning the scope of Congress's exceptions power. For instance, in *The 'Francis Wright'*, this Court noted that, under the exceptions power, "[n]ot only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review while others are not." 105 U.S. at 386. But "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens*, 19 U.S. (6 Wheat.) at 399; *see also Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960) (cautioning that, "[p]articularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts"). The expansive declaration in *The 'Francis Wright'* was immediately tempered by a statement of the specific holding in the case: "To our minds it is no more unconstitutional to provide that issues of fact shall not be retried in any case, than that neither issues of law nor fact shall be retried in

cases where the value of the matter in dispute is less than $5000." 105 U.S. at 386. Particularly in light of the implications of recognizing an expansive exceptions power, cases such as *The 'Francis Wright'* cannot be construed to hold that *any* classes of cases or orders, howsoever defined, permissibly may be shielded from this Court's appellate scrutiny.

Both 28 U.S.C. § 1334(d) and § 1452(b) plainly purport to make exceptions on the basis of legal content. Although the constitutional plan, consistent with this Court's precedent, indicates that Congress's power does not extend so far as to permit the exceptions identified in these statutes, this Court has never squarely addressed the problem posed in this petition. Moreover, this Court's holdings and statements on the general subject are not entirely consistent. Therefore, this Court should grant certiorari to review the constitutional validity of these statutes and to clarify Congress's power in this regard.

II. The Statutes Foreclose Review of Significant Legal Issues Which Previously Have Justified This Court's Assertion of Its Certiorari Jurisdiction

One manner of gauging the practical significance of the question posed is to consider the types of cases that are foreclosed from this Court's review. The cases affected implicate significant questions concerning the exercise of federal jurisdiction.

One of the subjects encompassed by the sweep of 28 U.S.C. §§ 1334(d) and 1452(b), and the subject matter pertinent to this case, is comity-based abstention from the exercise of federal jurisdiction and remand to state court. Specifically, 28 U.S.C. § 1334(c) permits district courts to abstain from exercising jurisdiction over cases "arising

under," "arising in," or "related to" bankruptcy jurisdiction "in the interest of justice, or in the interest of comity with State courts or respect for State law." Section 1452(b) incorporates these concepts by permitting district courts to remand on "any equitable ground."

When an Act of Congress borrows terms with established meanings from existing doctrine, it is presumed that those meanings apply unless Congress specifically signals to the contrary. *See Field v. Mans*, 516 U.S. 59, 69 (1995); *United States v. Noland*, 517 U.S. 535, 539 (1996); *Morissette v. United States*, 342 U.S. 246, 250 (1952). "Th[is] Court has followed this rule with particular care in construing the scope of bankruptcy codifications." *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986). Leading circuit authority confirms that the statutes' references to comity and abstention are meant to convey their familiar meanings. *See In re Pan Am. Corp.*, 950 F.2d 839, 845-46 (2d Cir. 1991) (discussing statutory language and legislative history).

Merely to describe the underpinnings and concerns of comity-based abstention is to note its importance. Abstention from the exercise of federal jurisdiction is a well-established doctrine based on "deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996); *see also Younger v. Harris*, 401 U.S. 37, 44 (1971) (similar). The doctrine is one peculiarly within the province of the Article III judiciary: "[t]his use of equitable powers is a contribution *of the courts* in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers." *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941) (emphasis added). Thus, abstention involves sensitive determinations of when federal courts must

relinquish their jurisdiction "because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." *Id.* at 501 (citation omitted).

These determinations are sensitive also because "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush*, 517 U.S. at 716. And although federal courts may abstain on grounds of comity and federalism, they may do so only in "'exceptional circumstances.'" *Id.* (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). "Exceptional circumstances" do not arise as a matter of course, but, rather, traditionally have been limited to those instances in which assertion of jurisdiction may entangle federal courts in issues "'intimately involved '" with a state's "'sovereign prerogative.'" *Id.* at 717 (quoting *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959)). Because of the "virtually unflagging" duty to honor federal jurisdiction, the concept of "sovereign prerogative" has been construed narrowly. *See Quackenbush*, 517 U.S. at 716-17; *Colorado River*, 424 U.S. at 816-17; *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189-91 (1959); *Meredith v. City of Winter Haven*, 320 U.S. 228, 235-36 (1943).

Legal standards governing the exercise of federal jurisdiction cannot be the subject of confusion, all the more so in an area that concerns balancing state and federal interests.[4] The federal bankruptcy interest, moreover, is particularly strong, a fact reflected in part by the breadth of its jurisdictional reach. *See, e.g., Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995). Even when that jurisdiction was more circumscribed, this Court asserted its certiorari

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4. Thus, for example, in *Quackenbush*, this Court adopted a narrowing construction of 28 U.S.C. § 1447(d), permitting for the review of abstention-based remand orders. *See* 517 U.S. at 713.

jurisdiction to review the propriety *vel non* of abstention in bankruptcy-related litigation. *See Mangus v. Miller*, 317 U.S. 178 (1942); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940). If the abstention issues raised in bankruptcy-related litigation previously have warranted this Court's exercise of certiorari power, it follows that Congress's prohibition of *all* review of such cases merits this Court's scrutiny.

III. Decisions in the Lower Courts Bespeak Doctrinal Confusion and Discord

The constitutional plan, as reflected in Article III, envisions a hierarchical judiciary at the apex of which resides a unitary Supreme Court because only *one* body may pronounce authoritatively the law of the land. *See* The Federalist No. 22, at 182 (Alexander Hamilton); *see also Hunter's Lessee*, 14 U.S. (1 Wheat.) at 348. The dissonant rulings of the lower courts on the question of comity-based abstention from bankruptcy jurisdiction indicates the necessity for an ultimate voice to resolve the disagreements.

In many instances, the lower courts have departed from established precedent in their application of comity and federalism-based abstention and remand. Ordinarily, comity-based abstention is proper when the exercise of federal jurisdiction would compromise a state's sovereign prerogative. Comity-based abstention traditionally has been justified where the request for equitable relief raises concerns of interference with state criminal proceedings, tax collection, administrative process, or where resolution of a serious constitutional question may be obviated by affording state courts an opportunity to construe state law. *See Quackenbush*, 517 U.S. at 716-17 (summarizing this Court's abstention precedent).

The articulation and application of this doctrine by the district court below indicates just how far some courts depart from established law. The district court grounded its comity-based abstention and remand in five factors: (i) predominance of Alabama state law issues; (ii) no *per se* bankruptcy issues; (iii) potential compromise of plaintiffs' right to trial; (iv) purported recognition by SLUSA of states' "special interests"; and (v) uncertainty as to the existence of "related to" bankruptcy jurisdiction. These factors, by themselves or in the collective, do not justify abstention.

This Court already has rejected some of the foregoing factors as insufficient to justify abstention from the exercise of federal jurisdiction. It long has been held that the mere existence of difficult issues of state law is not reason enough to relinquish federal jurisdiction. *See, e.g., Meredith*, 320 U.S. at 234 (stating that "the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction"). If federal courts may not abstain because of the difficulty of a state law question, the multiplicity of such questions, with no showing of any particular complexity, *a fortiori* does not justify abstention. A conclusion to the contrary would bring into question the entire foundation for diversity jurisdiction. *See Propper v. Clark*, 337 U.S. 472, 490 (1949) (noting that abstaining in a diversity case based on the difficulty of a state law issue "would be to enervate diversity jurisdiction").

Other factors invoked by the district court turn abstention doctrine on its head. It is the ultimate irony, for instance, to invoke rights conferred by a federal statute as a justification for abstention. That the Securities Act permits certain pension funds to bring claims in state court does not support abstention, particularly when federal subject matter and removal jurisdiction otherwise exist. Moreover, merely filing an action under the Securities Act implicates no sovereign

prerogative of the state as that concept traditionally has been described by this Court. If anything, the existence of federal questions (here, securities law) and federal interests (here, bankruptcy) weigh heavily against the surrender of federal jurisdiction. What is more, in this instance, the district court's reliance on SLUSA adds to the irony; the provisions embodied in those amendments were designed to expand federal jurisdiction over suits brought under the Securities Act, and they did not purport otherwise to change the *status quo*. *See, e.g.*, *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 & n.4 (2d Cir. 2001).

Nor, contrary to the district court's analysis, is "uncertainty" about federal jurisdiction a reason to abstain. Abstention assumes the existence of jurisdiction and then asks whether any particular state interests compel abdication from its exercise. *See, e.g.*, *County of Allegheny*, 360 U.S. at 188-89. By focusing on its own "uncertainty" about federal jurisdiction, the district court posed the wrong question. If federal jurisdiction exists, there is an "unflagging" obligation to exercise it, unless *other* reasons, falling within recognized categories of state interests that justify abstention, compel otherwise.

In the same vein, the district court's suggestion that the absence of a *per se* bankruptcy issue also militates in favor of remand, if taken to its logical conclusion, would undermine the entire basis for "related to" bankruptcy jurisdiction. Typically, actions that are "related to" a bankruptcy are non-core and thus do not raise *per se* bankruptcy issues. But if this were a reason to abstain, it would undermine the very ability to assert "related to" bankruptcy jurisdiction. Again, reasons for abstention must relate to a state's "sovereign prerogative"; abstention cannot be justified by questioning the scope of federal bankruptcy jurisdiction.

In sum, the factors relied upon by the district court in its abstention analysis find no doctrinal support.[5] This confusion in the understanding of doctrine has resulted in conflicting rulings. The fact of conflicting decisions is a foreseeable occurrence. But when discord occurs in the same overall litigation and in cases simultaneously presenting identical questions and circumstances, considerations of fairness and institutional consistency make correction imperative. When the conflicts emanate from differing understandings of the law, this Court's role is implicated.

In the ordinary course, this Court's appellate jurisdiction enables it to resolve conflicts over the proper interpretation of federal law. Although any one particular case may not justify this Court's review, there always is the opportunity for *some* case to receive the necessary scrutiny. Here, however, unless the constitutional validity of 28 U.S.C. §§ 1334(d) and 1452(b) is examined, there will never be such a resolution. Accordingly, certiorari should be granted.

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5. The more recent abstention decisions by potential transferor courts in the Bondholder Actions display similar infirmities. *See Ill. Mun. Ret. Fund v. Citigroup, Inc.*, Civ. No. 03-465-GPM, slip. op. at 5 (S.D. Ill. Sept. 9, 2003) (abstaining and remanding on the ground that Illinois "has an interest in resolving matters concerning state pension funds" and that removal of the Securities Act action and the request for transfer with the JPML was a "clear case of forum shopping"); *Tenn. Consol. Ret. Sys. v. Citigroup, Inc.*, No. 3:03-0128, slip. op. at 6-7 (M.D. Tenn. May 9, 2003) (abstaining because of "Congress' [sic] express desire to allow state court actions and in light of the importance of protecting public retirement resources from violations of the [Securities] Act").

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 18, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15385
Non-Argument Calendar

D.C. Docket No. 02-00898-CV-A-N

THE RETIREMENT SYSTEMS OF ALABAMA, consisting of The Employees Retirement System of Alabama and The Teachers Retirement System of Alabama; The Public Education Employees' Health Insurance Fund; The Public Employees Individual Retirement Account Fund; The Clerks' and Registers' Supernumerary Fund; The Wildlife and Freshwater Fisheries Fund; The Alabama Cultural Resources Preservation Trust Fund; and the Alabama Trust Fund,

Plaintiff-Appellee,

versus

J.P. MORGAN CHASE & CO.,
J.P. MORGAN SECURITIES, INC., et al.,

Defendants-Appellants.

Appendix A

Appeal from the United States District Court
for the Middle District of Alabama

Before TJOFLAT, BIRCH, and COX, Circuit Judges.

PER CURIAM:

The Defendants[1] seek review of the district court's order remanding this action to state court pursuant to the court's discretionary abstention power under 28 U.S.C. § 1334(c)(1). The Retirement Systems of Alabama ("RSA") filed suit against the Defendants based on their alleged involvement in, or culpable knowledge of, the events and transactions that led to WorldCom Corporation's bankruptcy. Some of the Defendants filed a timely notice of removal to federal district court based on 28 U.S.C. § 1452(a), but the district court exercised its discretionary abstention power under § 1334(c)(1) and granted RSA's Motion to Remand or to Abstain.

On appeal, RSA contends that this court lacks appellate jurisdiction to review the court's abstention decision based on the statutory bars to appellate review contained in 28 U.S.C. §§ 1334(d) and 1452(b). In response, the Defendants contend that the statutory bars in §§ 1334(d) and 1452(b) are unconstitutional and that this court has jurisdiction to evaluate the constitutionality of these statutes.

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1. "The Defendants" refers collectively to J.P. Morgan Chase & Co.; J.P. Morgan Securities, Inc.; Citigroup, Inc.; Salomon Smith Barney, Inc.; Arthur Andersen, LLP; Bank of America Corp.; Banc of America Securities LLC; Bernard J. Ebbers; Scott D. Sullivan; and Bear Stearns & Co., Inc.

Based on their argument that the statutory bars to appellate review are unconstitutional, the Defendants contend that this court has jurisdiction to review the district court's abstention order and they urge this court to hold that the district court's order constitutes an abuse of discretion. The United States has intervened to defend the constitutionality of §§ 1334(d) and 1452(b).

We have jurisdiction to evaluate the constitutionality of §§ 1334(d) and 1452(b). *See, e.g., Felker v. Turpin*, 518 U.S. 651, 661, 665, 116 S. Ct. 2333, 2339, 2341 (1996) (dismissing for want of jurisdiction *after* rejecting a constitutional challenge brought on Article III, § 2, Exceptions Clause grounds); *see also United States v. Ruiz*, __U.S. __, 122 S. Ct. 2450, 2454 (2002) (noting that a federal court always has jurisdiction to determine its own jurisdiction). Having carefully reviewed the briefs submitted by RSA, the Defendants, and the United States, we conclude that the statutory bars to appellate review contained in §§ 1334(d) and 1452(b) are constitutional. *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 513-14 (1869); *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 104 (1870). As a result, we lack jurisdiction to consider the Defendants' argument that the district court abused its discretion when it exercised its discretionary abstention power under § 1334(c)(1) and remanded the action to state court.[2]

DISMISSED FOR WANT OF JURISDICTION.

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2. RSA's motion to dismiss, which was carried with the case, is DENIED AS MOOT in light of our conclusion in this opinion that we lack jurisdiction under §§ 1334(d) and 1452(b).

APPENDIX B — MEMORANDUM OPINION OF THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION DATED AND FILED SEPTEMBER 24, 2002

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

NO. 02-A-898-N

THE RETIREMENT SYSTEMS OF ALABAMA, consisting of THE EMPLOYEES RETIREMENT SYSTEM OF ALABAMA and THE TEACHERS RETIREMENT SYSTEM OF ALABAMA; THE PUBLIC EDUCATION EMPLOYEES' HEALTH INSURANCE FUND; THE PUBLIC EMPLOYEES INDIVIDUAL RETIREMENT ACCOUNT FUND; THE CLERKS' AND REGISTERS' SUPERNUMERARY FUND; THE WILDLIFE AND FRESHWATER FISHERIES FUND; THE ALABAMA CULTURAL RESOURCES PRESERVATION TRUST FUND; and THE ALABAMA TRUST FUND

Plaintiffs,

vs.

J. P. MORGAN CHASE & CO., J. P. MORGAN SECURITIES, INC., CITIGROUP, INC., SALOMON SMITH BARNEY, INC., ARTHUR ANDERSEN, LLP, BANK OF AMERICA CORP., BANC OF AMERICA SECURITIES LLC, BERNARD J. EBBERS, SCOTT D. SULLIVAN, BEAR STEARNS & CO., INC., ET AL.

Defendants.

Appendix B

MEMORANDUM OPINION

This matter is before the court pursuant to the August 13, 2002, Order of this court (Doc. #13) directing the Defendants to show cause why this case should not be remanded to the Circuit Court of Montgomery County, Alabama, for the same reasons discussed in this court's Memorandum Opinion in *Retirement Systems of Alabama v. Merrill Lynch & Co. et al.*, 209 F. Supp. 2d 1257 (M.D. Ala. 2002). Pending before the court are: 1) Plaintiffs' Motion to Remand or to Abstain (Doc. #8), 2) Plaintiffs' Motion to Stay Consideration of Defendants' Motion to Transfer and For Preliminary Injunction (Doc. #9), 3) Plaintiffs' Motion for Expedited Hearing on Remand and Stay Motions (Doc. #10), and 4) Defendants' Salomon Smith Barney Inc. ("Salomon Smith Barney"), J.P. Morgan Securities Inc. ("JPM Securities"), Banc of America Securities LLC, and Citigroup, Inc. ("Citigroup") Motion to Stay Proceedings Pending Determination of the Multidistrict Panel and To Set Briefing Schedule (Doc. #14).

After a careful and thorough review of the pleadings, motions, and memorandums filed by counsel in this case and for the reasons discussed below, the court finds that Plaintiffs' Motion to Remand or to Abstain is due to be GRANTED. The remaining pending motions are due to be DENIED.

I. Procedural History

The Retirement Systems of Alabama and its constituent pension funds ("RSA") originally filed this case on July 15, 2002, in the Circuit Court of Montgomery County, Alabama.

RSA amended its complaint on July 31, 2002. Defendants J.P. Morgan Chase & Co. ("JPM Chase"), Bank of America Corp., Banc of America Securities LLC, Salomon Smith Barney, JPM Securities, and Citigroup timely removed this case to this court under 28 U.S.C. § 1452 on August 5, 2002.[1] Title 28 U.S.C. § 1452(a) provides:

> A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334[2] of this title.

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1. Defendants JPM Securities, Salomon Smith Barney, Banc of America Securities LLC, and Citigroup are collectively referred to as the "Underwriter Defendants" in this opinion. The Underwriter Defendants oppose RSA's Motion to Remand or Abstain. Bear Stearns & Co., Inc., later joined the arguments made by the Underwriter Defendants in opposing the Motion to Remand or Abstain. Defendant Bear Stearns' Joinder in Support or Underwriter Defendants' Memorandum in Response to Order to Show Cause Why This Case Should Not Be Remanded to State Court (Doc. #22).

2. 28 U.S.C. § 1334(a) & (b), the applicable provisions to this case, state:

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(Cont'd)

28 U.S.C. § 1452(a). Defendant Arthur Andersen LLP ("Andersen") did not join the Notice of Removal. RSA filed its timely motion to remand or abstain an August 9, 2002.

II: Remand Standard

Federal courts are courts of limited jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994); *Wymbs v. Republican State Executive Comm.*, 719 F.2d 1072, 1076 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984). They may only hear cases that they have been authorized to hear by the Constitution or the Congress of the United States. *See Kokkonen*, 511 U.S. at 377. The Eleventh Circuit favors remand of removed cases where federal jurisdiction is not absolutely clear. *See Burns*, 31 F.3d at 1095.

III. Background

The financial decline of the WorldCom Corporation brought about this litigation. RSA has sued a number of entities and persons allegedly involved in, and/or with culpable knowledge of, the events and transactions leading to WorldCom's bankruptcy. WorldCom filed its petition for Chapter 11 relief on July 21, 2002, in the United States

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(Cont'd)

> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Bankruptcy Court for the Southern District of New York. Prior to WorldCom's filing for bankruptcy, RSA had purchased millions of dollars worth of WorldCom debt securities as well as large amounts of WorldCom common stock. These securities are now largely valueless. RSA's Amended Complaint alleges that the Defendants[3] violated the Alabama Securities Act, *Ala. Code* §§ 8-6-1 *et seq.*, the Alabama common law of aiding and abetting, the Alabama statutory and common law of fraud, including *Ala. Code* § 6-5-100 *et seq.*, and Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77*k*, 77*l* (a)(2), & 77*o*.[4]

WorldCom is not a defendant in this action. Despite the large number of civil actions involving both WorldCom and the defendants in this case, the Judicial Panel on Multidistrict Litigation ("JPML") has yet to designate a Multidistrict Litigation ("MDL") court to consolidate these cases. The defendants have notified this court that the JPML has set a hearing for September 26, 2002, to consider the various lawsuits relating to WorldCom's collapse. Defendants Memorandum in Support of the Motion to Stay Proceedings, pp. 4,7 (Doc. #15); Declaration of Charles B. Paterson. p. 2.

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3. "Defendants" refers to all defendants in the case. "Underwriter Defendants," as explained above, refers to the group of underwriters who are objecting to RSA's Motion to Remand or Abstain. *See supra* n.1.

4. The Securities Act of 1933 prevents the removal to the federal courts of any case brought in state court under 15 U.S.C. § 77*a et seq.*, unless the case is a "covered class action." 15 U.S.C. §§ 77*v*(a) & 77*p*(c). The Underwriter Defendants are seeking to remove the case solely under the bankruptcy removal statutes, 28 U.S.C. §§ 1334(b) & 1452.

Appendix B

The facts in this case are quite similar to those found in this court's memorandum opinion in *Retirement Systems of Alabama v. Merrill Lynch & Co. et al.*, 209 F. Supp. 2d 1257 (M.D. Ala. 2002) ("*Merrill Lynch*"). Given the parties' familiarity with this decision, an extended discussion of that opinion is not necessary. The Order at issue in this case directed the Defendants to show cause why the Merrill Lynch opinion does not control the outcome of this case.

IV. Underwriter Defendants' Motion to Transfer

A preliminary issue facing the court is the Underwriter Defendants' Motion to Stay Proceedings Pending Determination of the Multidistrict Panel (Doc. #14). The Underwriter Defendants argue that *Gould v. National Life Insurance Co.*, 990 F. Supp. 1354 (M.D. Ala. 1998) compels this court to consider their motion to stay prior to deciding RSA's Motion to Remand or Abstain. Under Eleventh Circuit jurisprudence, "a court should inquire into whether it has subject matter jurisdiction at the earliest possible state in the proceedings." *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999). Because RSA's Motion to Remand or Abstain directly addresses the question of subject matter jurisdiction, the court will address that motion first in accordance with Eleventh Circuit guidance. *Accord Merrill Lynch*, 209 F. Supp. 2d at 1261 (deciding first the question of subject matter jurisdiction in the motion to remand instead of the motion to transfer).

Appendix B

V. RSA's Motion to Remand or Abstain

A. Responses to Show Cause Order

Pursuant to this court's August 13, 2002, Order directing the Defendants to show cause why this case should not be remanded to the state circuit court, the Underwriter Defendants offer several reasons why this case is distinct from *Merrill Lynch*. First, they argue that unanimity is not required for removal of cases under 28 U.S.C. § 1452. The Underwriter Defendants seek to distinguish this case from *Merrill Lynch* both by conforming the removal to Rule 9027 of the Federal Rules of Bankruptcy Procedure and by consenting to the entry of final orders and judgments by the bankruptcy judge. The Underwriter Defendants also note that even if the JPML intervenes, they will still seek to have the Southern District of New York chosen as the MDL court, from which this case can be automatically referred to the bankruptcy court supervising the WorldCom reorganization. In *Merrill Lynch*, the Merrill Lynch defendants[5] desired to transfer the case to the MDL court in Houston, Texas, instead of the Bankruptcy Court for the Southern District of New York, which was handling the Enron reorganization. 209 F. Supp. 2d at 1260-61. The Merrill Lynch defendants wanted to use the bankruptcy removal procedure under 28 U.S.C. § 1452 to transfer the case not to a bankruptcy court but to another district court. *Id.*

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5. In *Merrill Lynch*, the defendants included JPM Chase, Citigroup, and Bank of America Corp. For the sake of clarity, the court will refer to the defendants in *Merrill Lynch* as "Merrill Lynch defendants."

Second, the Underwriter Defendants argue that this case is "related to" the WorldCom bankruptcy within the meaning of 28 U.S.C. §§ 1334(b) & 1452. In support of this argument, the Underwriter Defendants offer the indemnification agreement contained in the underwriting agreements between WorldCom and the Underwriter Defendants. The Underwriter Defendants argue that these indemnification agreements provide for a present right of reimbursement by WorldCom to the Underwriter Defendants for their legal fees, as incurred, for any defense involving an issuance of WorldCom securities. The Underwriter Defendants have also filed a Proof of Claim in the United States Bankruptcy Court for the Southern District of New York for their indemnification claim against WorldCom. This was not present in *Merrill Lynch*. *See* 209 F. Supp. 2d at 1267 (noting absence of proof of claim filing).

RSA counters the distinctions purportedly drawn by the Underwriter Defendants between this case and *Merrill Lynch* by arguing that 28 U.S.C. § 1452 requires unanimity on the part of all of the defendants seeking to remove a case to federal court on the basis of "related to" jurisdiction. RSA also states that it has not participated in any filings before an MDL court involving WorldCom.

RSA reaffirms its position from *Merrill Lynch* that this case is not "related to" WorldCom's pending bankruptcy case in the Southern District of New York. In support of that position, RSA argues that the indemnity provisions at issue in this case cannot affect WorldCom's bankruptcy estate as required to establish "related to" jurisdiction under 28 U.S.C. § 1334. In the alternative, RSA argues that those indemnity

provisions are invalid and unenforceable as against public policy following the rationale of *Globus v. Law Research Service, Inc.*, 418 F. 2d 1276 (2d Cir. 1969).

As to the Underwriter Defendants' Proof of Claim filed in bankruptcy court, RSA submits that such a filing does not distinguish this case from *Merrill Lynch*. In the alternative, RSA argues that such a claim should be disallowed as a contingent and unmatured claim under 11 U.S.C. § 502(e)(1)(B).[6]

RSA also argues that its position as the state retirement plan for the employees in Alabama allows it to assert sovereign immunity as a defense to being forced to litigate in federal court. *See Ala. Code* § 36-27-2 (establishing employees' retirement system and vesting it with same immunity from suit accorded to the State). RSA's argument relies heavily on the Supreme Court's line of recent sovereign immunity and Eleventh Amendment decisions, notably *Alden v. Maine*, 527 U.S. 706 (1999), and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). The crux of RSA's argument is that RSA's sovereign immunity cannot be set aside through the removal of this case by the Underwriter Defendants under 28 U.S.C. §§ 1334(b) & 1452. RSA argues that its sovereign

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6. 11 U.S.C. § 502(c)(1)(B) provides in pertinent part:

> . . . the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that - - . . . (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution.

immunity protects it from becoming involved in any litigation in federal court without its consent despite the fact that RSA initiated this suit against the Defendants.

B. The Question of Unanimity under 28 U.S.C. § 1452

In an effort to distinguish this case from *Merrill Lynch*, the Underwriter Defendants argue that they conformed to Bankruptcy Rule 9027,[7] that Andersen, while not joining the Notice of Removal, nonetheless joins in the opposition to remand and the Underwriter Defendants' Motion to Stay,[8] and that contrary to *Merrill Lynch*, the Underwriter Defendants actually intend to use the bankruptcy removal statutes to remove this case to a bankruptcy court. These steps do not counter the fact that all of the defendants did not join the Notice of Removal. Thus, the analysis of the issue falls

7. Rule 9027 sets forth the procedure for removing a case under bankruptcy law. It does not grant a district court jurisdiction to hear a case. While the Underwriter Defendants have conformed to Rule 9027, Andersen has not. As the Underwriter Defendants stated in their Notice of Removal (Doc. #1), Andersen did not join the removal petition. The court must still analyze the jurisdictional question under 28 U.S.C. §§ 1334(b) & 1452. Federal jurisdiction is only properly found where the defendants meet the requirements of the applicable federal statutes, namely 28 U.S.C. §§ 1334 & 1452.

8. Andersen's joinder with the Underwriter Defendants in opposition to remand is only evidenced by the Underwriter Defendants' Memorandum of Law in Response to Show Cause Order Why This Case Should Not be Remanded to State Court at p. 21 n.14. Andersen has not filed any documents with the court objecting to remand.

back to the question presented in *Merrill Lynch*, namely, does § 1452 require all defendants to join a notice of removal?[9]

The Underwriter Defendants have relied on *Creasy v. Coleman Furniture Corp.*, 763 F.2d 656 (4th Cir. 1985), for their assertion that unanimity among the defendants is not required for removal under § 1452. As discussed in *Merrill Lynch*, the *Creasy* court cited no authority in reaching this analysis of § 1452. *See Merrill Lynch*, 209 F. Supp. at 1262; *see also*, *Creasy*, 763 F.2d at 660-61. Other courts have found that unanimity among the defendants is a requirement for removal under § 1452. *See Ross v. Thousand Adventures of Iowa, Inc.*, 178 F. Supp. 2d 996, 1001-02 (S.D. Iowa 2001) (granting motion to remand where all defendants failed to join in notice of removal under § 1452 and rejecting the view in *Sommers v. Abshire*, that the unanimity rule does not apply

9. The language of § 1452 highlighted in *Merrill Lynch* states that "a party may remove any claim or cause of action" that is "related to" a bankruptcy proceeding. 209 F. Supp. 2d at 1264. 28 U.S.C. § 1441(a) uses the following language: "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants. . . ." The court in *Sommers v. Abshire*, 186 B.R. 407, 408-09 (E.D. Tex. 1995), contrasted the language of the two provisions and concluded that because of the differences between "a party" and "the defendants," § 1452's language of "a party" did not require all defendants to unanimously agree to remove a matter to the federal courts. The lack of clarity over the proper construction of § 1452 was a factor in this court's decision not to base its decision to remand or abstain in *Merrill Lynch* on the statutory construction of § 1452. 209 F. Supp. 2d at 1264; *see id.* at 1264 n.13 (explaining that the Supreme Court's decision in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), raised the implication that "the unanimity requirement of § 1441 is also applicable to removals under § 1452 . . . .").

to § 1452); *Whitney Nat'l Bank v. Bunch*, No. 00-2859, 2001 U.S. Dist. LEXIS 1424, at *7 n.9 (E.D. La. Jan. 31, 2001) (noting that the rule of unanimity under 28 U.S.C. § 1446(b) "applies to 'related to' removals pursuant to 28 U.S.C. § 1452"); *Hills v. Hernandez*, 1998 U.S. Dist. LEXIS 7475, at *4-5 (E.D. La. May 13, 1998) (applying rule of unanimity under 28 U.S.C. § 1446(b) to § 1452 and remanding due to failure of all defendants to join the notice of removal filed under § 1452).

This court is aware of other decisions that reach the opposite conclusion.[10] *See Merrill Lynch*, 209 F. Supp. 2d at 1262-63 (listing cases that rely on *Creasy* "without undertaking any independent analysis of § 1452"). The Underwriter Defendants' attempts to distinguish this case have not presented this court with any authority compelling a different result than was reached in *Merrill Lynch*. The Underwriter Defendants rest their argument on the conclusion that their construction of § 1452 is correct and that § 1452 can be reconciled with the other removal provisions in 28 U.S.C. §§ 1441(a) & 1446.[11] Underwriter Defendants' Memorandum, p. 20. As this court noted in *Merrill Lynch*, the Supreme Court reasoned in *Things*

10. *See Abner v. Mate Creek Loading Inc.* (*In re Mid-Atlantic Res. Corp.*), No. 5:01-0699, 2002 U.S. Dist. LEXIS 16462, at *14 (S.D. W. Va. Aug. 26, 2002) (*citing Creasy* for the proposition that unanimity is not required for removal under § 1452); *Beasley v. Pers. Fin. Corp.*, 279 B.R. 523, 2002 U.S. Dist. LEXIS 15297, at *10-12 (S.D. Miss. May 17, 2002) (same).

11. 28 U.S.C. § 1446(a) provides, in part: "A defendant or defendants desiring to remove any civil action . . . shall file in the district court . . . a notice of removal. . . ."

Remembered, Inc. v. Petrarca, 516 U.S. 124, 129 (1995), that "[t]here is no express indication in § 1452 that Congress intended that statute to be the exclusive provision governing removals and remands in bankruptcy." *See Merrill Lynch*, 209 F. Supp. 2d at 1264 n.13 (emphasizing import of the *Things Remembered* decision on the analysis of § 1452). Following the reasoning in *Things Remembered*, the proper analysis of a removal taken under § 1452 may very well include asking whether the removal is unanimous as is required by § 1441. Where doubts exist about the district court's jurisdiction in a removed action, the Eleventh Circuit counsels the district courts to remand. *See Burns*, 31 F.3d at 1095.

Despite the Underwriter Defendants' intent to actually remove this case to a bankruptcy court instead of another district court, a bankruptcy court cannot exercise jurisdiction unless the statutory prerequisites for that jurisdiction are met. *See Kokkonen*, 511 U.S. at 377 ("Federal courts . . . possess only that power authorized by Constitution and statute."). In this case, it is at best unclear as to whether the Underwriter Defendants fulfilled the statutory procedural requirements for removing this case pursuant to § 1452. The Underwriter Defendants have failed to show why the question of unanimity under a § 1452 notice of removal should not be answered by referring to *Merrill Lynch*.

C. 23 U.S.C. §§ 1334 & 1452: Related To Jurisdiction

The key distinction that the Underwriter Defendants have drawn between this case and *Merrill Lynch* is that the Underwriter Defendants have filed a Proof of Claim in

the bankruptcy court handling the WorldCom estate. *See* Declaration of Charles B. Paterson, Aug. 20, 2002, Exh. 1. The Underwriter Defendants allege that this Proof of Claim and the language of the contractual indemnity agreements contained in the Underwriting Agreements between WorldCom and the Underwriter Defendants make this case "related to" the WorldCom reorganization. The Eleventh Circuit set out the test for federal "related to" jurisdiction in *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788 (11th Cir. 1990), by adopting without alteration the standard set forth in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984). The *Pacor* court explained the test by saying:

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on that estate being administered in bankruptcy. (citations omitted). Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Id. at 994. The Supreme Court spoke approvingly about this test in *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). The Eleventh Circuit later added that "[t]he key word in the *Lemco Gypsum* test is 'conceivable,' which makes the jurisdictional grant very broad." *In re Toledo*, 170 F.3d 1340, 1345 (11th Cir. 1999).

Appendix B

There is some case law which supports the Underwriter Defendants' argument. In *In re Salem Mills, Inc.*, 148 B.R. 505, 510 (Bankr. N.D. Ill. 1992), the court explained that the filing of a proof of claim by a third-party against a debtor in order to seek to enforce an indemnity agreement against the debtor "merely transforms the improbable into the conceivable." In *Salem Mills*, the bankruptcy court found that "related to" jurisdiction existed where a third-party had a contractual right from a settlement agreement to pursue indemnification claims against the debtor. *Id.* at 507, 510. By filing the proof of claim, the third-party demonstrated the "real or tangible impact" that the indemnification agreement could have on the estate. *Id.* at 510. According to the *Salem Mills* court, this claim was enough to justify "related to" jurisdiction. *Id.*; *see id.* at 509 ("If a proceeding is related to the underlying bankruptcy by virtue of an indemnification agreement against the debtor, there must be something to evidence the impact, like a proof of claim. . . ."); *In re U.S. Brass Corp.*, 173 B.R. 1000, 1004 (Bankr. E.D. Tex. 1994) (automatically asserting "related to" jurisdiction upon the filing of a proof of claim by a third-party against the debtor based on indemnity claims a contractual indemnity agreement). *But see Salem Mills*, 148 B.R. at 509 (stating that even if a proof of claim is filed, a court must still value the claim and determine "the true impact the third-party proceeding may have upon the allocation of assets among creditors, *if any*") (emphasis added).

This court, however, is hesitant to reach the conclusion that the act of filing a proof of claim in bankruptcy court is sufficient to guarantee "related to" jurisdiction. *See Kalamazoo Realty Venture Ltd. P'ship v. Blockbuster*

Entm't Corp., 249 B.R. 879, 885 (N.D. Ill. 2000) (stating that filing of proof of claim on an indemnity agreement against a debtor "might confer "related to" jurisdiction"); *In re Spaulding & Co.*, 131 B.R. 84, 89 (N.D. Ill. 1990) (explaining, in the context of "related to" jurisdiction regarding a reimbursement action, that if the defendant filed a proof of claim against the debtor, "it may be necessary to revisit this [jurisdictional] issue"). The parties have cited no cases in which the Eleventh Circuit addresses this issue, and research has not revealed any, either. The court is also mindful of the fact that despite the broad language of the *Pacor* standard, the application of the test to claims for indemnification often results in mixed conclusions.[12]

In *Pacor* itself, the court found that "related to" jurisdiction was not present in a dispute between Pacor (the Philadelphia Asbestos Company) and the Higgins family, asbestos products liability plaintiffs. 743 F.2d. 995. Pacor,

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12. Cases involving indemnification claims and concluding that "related to" jurisdiction does not exist include: *In re Federal-Mogul Global, Inc.* ("*Federal-Mogul #2*"), 300 F.3d 368 (3d Cir. 2002); *Pacor Inc., v. Higgins*, 743 F.2d 984 (3d Cir. 1984); *Wise v. Travelers Indem. Co.*, 192 F. Supp. 506 (N.D. W. Va. 2002); *Skylark v. Honeywell Int'l. Inc.*, No. 01-5069, 2002 U.S. Dist. LEXIS 10554, at *8-10 (S.D. Fla. Jan. 25, 2002); *In re Asbestos Litig.*, 271 B.R. 118 (S.D. W. Va. 2001); and *In re Spaulding & Co.*, 131 B.R. 84 (N.D. Ill. 1990).

Cases involving indemnification claims and concluding that "related to" jurisdiction does exist include: *In re Celotex Corp.*, 124 F.3d 619 (4th Cir. 1997) (proofs of claim filed by both plaintiff and defendant against Celotex) and *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996).

similarly to the Underwriter Defendants in this case, attempted to argue that its possible indemnification claim against Johns-Manville Corporation following the resolution of the Pacor-Higgins case would affect the Johns-Manville bankruptcy estate. *Id.* The Third Circuit, despite the broad language of its test, refused to agree and stated that "[t]he fact remains that any judgment received by the plaintiff Higgins could not itself result in even a contingent claim against Manville, since Pacor would still be obligated to bring an entirely separate proceeding to receive indemnification." *Id.*

It is worth noting that the seemingly broad scope of the *Pacor* test is indeed checked by the court's language following its announcement of the standard.

> Our examination of the Higgins-Pacor-Manville controversy leads us to conclude that the primary action between Higgins and Pacor would have no effect on the Manville bankruptcy estate, and therefore is not "related to" bankruptcy within the meaning of section [1334(b)]. At best, it is a mere precursor to the potential third party claim for indemnification by Pacor against Manville. Yet the outcome of the Higgins-Pacor action would in no way bind Manville, in that it could not determine any rights, liabilities, or course of action of the debtor. . . . Even if the Higgins-Pacor dispute is resolved in favor of Higgins, . . . Manville would still be able to relitigate any issue, or adopt any position, in response to a subsequent claim by Pacor.

Pacor, 743 F.2d at 995 (citations omitted). The *Pacor* situation is analogous to the situation presented in this case. The current

action against the Underwriter Defendants is, at best, a precursor to further litigation over the indemnity agreement. The language of the indemnity agreement (discussed *infra*) is far from certain in establishing when and if indemnification accrues to an indemnified party. The *Pacor* court's decision that "related to" jurisdiction was lacking despite the expansive scope of the standard emphasizes the burden placed on the Underwriter Defendants in this case to conclusively show that "related to" jurisdiction is indeed present. *See Federal-Mogul #2*, 300 F.3d at 381-92 (following *Pacor* and concluding that "because any indemnification claims that the [defendants] might have against Debtors have not yet accrued and would require another lawsuit before they could have an impact on Federal-Mogul's bankruptcy proceeding . . . the District Court's ruling that it lacked subject-matter jurisdiction" was not error).

Some courts have relied on the implication in *Pacor* that contractual indemnity agreements automatically confer "related to" jurisdiction when a defendant could use the agreement to pursue a claim against the debtor's estate.[13] *See Pacor*, 743 F.2d at 995. The *Pacor* court distinguished the Pacor-Higgins dispute from *In re Brentano's*, 27 B.R. 90

13. *See In re Celotex Corp.*, 124 F.3d at 627 (contractual indemnification obligations creates "related to" jurisdiction); *U.S. Brass Corp.*, 173 B.R. at 1004 (contractual indemnity agreement establishes "related to" jurisdiction upon filing of proof of claim). *But see In re Federal-Mogul Global, Inc.*, ("*Federal-Mogul #1*) Nos. 01-10578 et al., 2002 Bankr. LEXIS 937, at *25 (Bankr. Del. Feb. 15, 2002) ("[C]ases since *Pacor* have failed to endorse the proposition that any contract of indemnification will support an extension of related to jurisdiction."), *appeal dismissed and mandamus denied*, 300 F.3d 368 (3d Cir. 2002).

(Bankr. S.D.N.Y. 1983). In dicta discussing *Brentano's*, the Third Circuit suggested that contractual indemnity agreements "would automatically result in indemnification against [the debtor]."[14] *Pacor*, 743 F.2d at 995. The *Pacor* court went on to distinguish Pacor's possible claim for indemnification against Johns-Manville from the facts in *Brentano's*. *Pacor*, 743 F.2d at 995.

In *Brentano's*, MacMillan agreed to serve as a guarantor for Brentano's lease of real property from Pine Realty, Inc., 27 B.R. at 91. The guaranty agreement obligated Brentano's to indemnify MacMillan for any liability incurred while serving as a guarantor. *Id.* When Brentano's filed for bankruptcy, Pine Realty commenced a suit in state court on the guarantee against MacMillan. *Id.* MacMillan moved for a stay of the suit in bankruptcy court. The bankruptcy court found "related to" jurisdiction based on the indemnity agreement and its possible effects, in the event of Pine Realty prevailing over MacMillan, on the bankruptcy estate. In its analysis of *Brentano's*, the *Pacor* court reasoned that the guaranty and indemnity agreement would automatically affect the debtor's estate in the event Pine Realty prevailed over Macmillan. *Pacor*, 743, F.2d at 995.

Brentano's is distinguishable for another reason as well. MacMillan served as the guarantor for eleven separate Brentano's leases. 27 B.R. at 91. MacMillan was the largest unsecured creditor in the Brentano's bankruptcy case, and the court stated that "the disposition of [MacMillan's] claim

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14. *See Federal-Mogul #1*, 2002 Bankr. LEXIS 937, at *30 ("[*Pacor*] may also be read to suggest that an indemnity agreement alone will not suffice.").

is one of the most important aspects (if not the most important) of the debtor's efforts to reorganize." *Id.* The *Brentano's* court's analysis suggests that its decision in finding "related to" jurisdiction, while based on the contractual agreements between Brentano's and MacMillan, also was based on MacMillan's role as Brentano's largest unsecured creditor and on the fact that resolving MacMillan's claims was crucial to the outcome of the reorganization efforts. *See id.* at 92 ("The disposition of this claim and other similar claims involving Brentano's leases, MacMillan guaranties, and the Brentano's-MacMillan indemnification agreement will ultimately determine the fate of this reorganization effort.").

The fact-specific line-drawing engaged in by the *Pacor* court and others suggest that a close reading of the indemnity agreement between the Underwriter Defendants and WorldCom is in order. The language of the agreement is clear.

> [WorldCom] will not be liable . . . to the extent that any such loss, claim, damage or untrue statement or omission or alleged omission made . . . in reliance upon and in conformity with written information furnished to the Company by or on behalf of any Underwriter. . .
>
> [S]uch indemnity with respect to any Basic Prospectus or Preliminary Prospectus shall not inure to the benefit of any Underwriter . . . from whom the person asserting any such loss, claim, damage or liability purchased the Offered Securities which are the subject thereof if such

> person did not receive a copy of the Prospectus . . . at or prior to the confirmation of the sale. . . .

Declaration of Charles B. Paterson, Aug. 20, 2002, Underwriters Agreement, p. 15. Without passing judgment on the merits of the Underwriter Defendants' claim against WorldCom, the language of the indemnity agreement suggests that before the claims in this lawsuit can have any conceivable effect on WorldCom's bankruptcy estate, it must be established that the Underwriter Defendants have made no "untrue statement[s] or omission[s] or alleged omission[s]" in any representations they made to WorldCom. WorldCom's liability under the indemnity agreement is contingent upon such a finding. Presently, the Underwriter Defendants have presented no evidence to this court of WorldCom conceding the fact that it is liable to the Underwriter Defendants. It is indeed doubtful that WorldCom, even upon the Underwriter Defendants prevailing in this lawsuit, will automatically acknowledge that it was the source of "alleged omission[s]" and immediately pay any indemnity allegedly owed to the Underwriter Defendants. The filing of a proof of claim in the bankruptcy court will not erase the contingency contained in the indemnity agreement.

"The key word in the *Lemco Gypsum/Pacor* test is 'conceivable' . . ." *In re Toledo*, 170 F.3d at 1345. As the foregoing discussion shows, it appears that it is not "conceivable" that this lawsuit will affect WorldCom's bankruptcy estate. Where a lawsuit's potential effect on a bankruptcy estate is "speculative and premature," then such a case fails to warrant federal bankruptcy "related to" jurisdiction. *Skylark v. Honeywell Int'l, Inc.*, No. 01-5069,

2002 U.S. Dist. LEXIS 10554 (S.D. Fla. Jan. 25, 2002); *see Federal-Mogul #1*, 2002 Bankr. LEXIS 937, at *26 (noting that even though present suit may create "very substantial claims, against the debtors in the future," based on indemnification claims, the underlying facts concerning the indemnity will have to be adjudicated before the current claims can affect the estate).

Additionally, the completion of this lawsuit may not have *any* impact on the WorldCom bankruptcy estate. *See Federal-Mogul #2*, 300 F.3d at 382 (stating that because indemnification claims against debtor would necessitate another lawsuit before it could impact the debtor's estate, the finding that jurisdiction was lacking was not error); *Bank United v. Manley*, 273 B.R. 229, 243-44 (N.D. Ala. 2001) ("[B]ankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor." (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995))). Regardless of how this lawsuit ends, it will not increase or decrease the size of the WorldCom estate. RSA is not suing WorldCom for any damages. As discussed above, the Underwriter Defendants' indemnification claims are contingent, not absolute. *See Merrill Lynch*, 209 F. Supp. 2d at 1267 (noting that one concern this court had in exercising "related to" jurisdiction was the viability of the claims for indemnification). *Cf. Davis v. Life Investors Ins. Co. of Am.*, No. 3:01CV799LN, 2002 U.S. Dist. LEXIS 14383, at *8 (S.D. Miss. May 30, 2002) (finding "related to" jurisdiction where the proof of claim against the debtor was based on an "*absolute* right of indemnity" against the debtor (emphasis added)).

Thus, this court concludes that uncertainty remains over the issue of § 1334(b) "related to" jurisdiction despite the indemnity agreement and the Underwriter Defendants' proof of claim. It is not clear that the Underwriter Defendants have the same relationship to WorldCom as the third-party defendant did in *Brentano's*, i.e. the largest unsecured creditor. *See Federal-Mogul #1*, 2002 Bankr. LEXIS 937, at *28-29 (noting relationship of MacMillan to Brentano's as a factor in *Brentano's* decision). Other courts have been hesitant to find "related to" jurisdiction where the tenuous basis for jurisdiction is an indemnity agreement, the certainty of which is questioned. *See id.* at *27-28 (refusing to find "related to" jurisdiction on an indemnity agreement where it was unclear that the agreement would bind the debtor). The *Federal-Mogul #1* court explained:

> To the extent that the validity of an indemnity agreement is in doubt, the directness between the third-party action and a judicial ruling that will affect the estate is attenuated. Moreover, as the jurisprudence shows, cases in which related-to jurisdiction is founded solely on an indemnification agreement between otherwise unrelated parties are not the rule but the exception.

Id. at *28. Based on the above discussion, this court concludes that the Underwriter Defendants have failed to show why this case should not follow the decision of this court in *Merrill Lynch*.

Appendix B

VI. Discretionary Abstention: 28 U.S.C. § 1334(c)

This court abstained under 28 U.S.C. § 1334(c)(1)[15] from exercising "related to" jurisdiction in *Merrill Lynch*. 209 F. Supp. 2d at 1267-68. In *Cassidy Wyeth-Ayerst Laboratories*, 42 F. Supp. 2d 1260, 1263 (M.D. Ala. 1999), the court set out twelve factors to consider when deciding whether to abstain. The twelve factors are:

> (1) the effect, or lack thereof, on the efficient administration of the bankruptcy estate if the discretionary abstention is exercised, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable state law, (4) the presence of related proceedings commenced in state court or other non-bankruptcy courts, (5) the jurisdictional basis, if any, other than § 1334, (6) the degree of relatedness or remoteness of the proceedings to the main bankruptcy case, (7) the substance rather than the form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the

---

15. 28 U.S.C. § 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for state law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

> burden on the bankruptcy court's docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to jury trial, and (12) the presence in the proceeding of non-debtor parties.

Cassidy, 42 F. Supp. 2d at 1263. The Underwriter Defendants have attempted to set out distinctions between this case and *Merrill Lynch*, and they argue that this court should not abstain from exercising jurisdiction in this case.

Despite the Underwriter Defendants' arguments to the contrary, the concerns about the existence of jurisdiction under §§ 1334(b) & 1452 still exist. All defendants did not join the removal notice. This court's concerns about subject matter jurisdiction under the "related to" prong of § 1334(b) have not been resolved. Furthermore, similarly to *Merrill Lynch*, this case involves both state statutory and common law claims, and RSA has requested a jury trial. *See* 209 F. Supp. 2d at 1268 (noting the court's consideration of those factors). Like *Merrill Lynch*, the Underwriter Defendants' purported basis for jurisdiction is limited to §§ 1134(b) & 1452. As explained above, that basis jurisdiction is tenuous at best. To exercise jurisdiction would contradict the guidance of the Eleventh Circuit, which favors remand in cases where federal jurisdiction is not absolutely clear. *See Burns*, 31 F.3d at 1095.

The various factors discussed in *Cassidy* warrant abstention in this case. Only non-debtor parties are involved in this litigation. RSA has requested a jury trial, and that

request will be difficult to meet in bankruptcy court. This action is relatively remote from the bankruptcy proceeding in that it will not have any effect on WorldCom's bankruptcy estate. The Underwriter Defendants have failed to show why this case is not governed by *Merrill Lynch* and why this court should not exercise discretionary abstention for the reasons explained in *Merrill Lynch*. This court concludes that, even assuming jurisdiction exists under §§ 1334(b) & 1452, it should abstain under 28 U.S.C. § 1334(c)(1) from hearing this case. Accordingly, the court does not reach any additional issues raised by RSA.

A separate Order will be entered in accordance with this Memorandum Opinion.

Done this 24th day of September, 2002.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX C — CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Const. art. III, § 2, cl. 2:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

28 U.S.C. § 1334:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
>
> (c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

Appendix C

28 U.S.C. § 1452:

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

APPENDIX D — WORLDCOM BONDHOLDER ACTIONS

WORLDCOM BONDHOLDER ACTIONS

Bondholder Actions Filed in Federal Court

1. *Patrick Emanuele, et al. v. WorldCom, Inc., et al.*, C.A. No. 1:02-1353 (D. D.C.)

2. *Above Paradise Investments, Ltd. v. WorldCom, Inc., et al.*, C.A. No. 1:02-4990 (S.D.N.Y.)

3. *Municipal Police Employees Retirement System of Louisiana v. WorldCom, Inc., et al.*, C.A. No. 1:02-5285 (S.D.N.Y.)

4. *Longacre Master Fund Ltd. v. Worldcom, Inc.*, Case No. 02-CV-1260-WS (HTW) (S.D. Miss.)

5. *SunTrust Bank, et al. v. Ebbers, et al.*, Case No. 021499 (S.D. Miss.)

6. *Metro. Gov't of Nashville & Davidson County, Tenn. v. Ebbers, et al.*, Case No. 3-03 0734 (M.D. Tenn.)

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Bondholder Actions Filed in State Court and Finally Transferred by the JPML to the Southern District of New York

1. *California Public Employees' Retirement Systems v. WorldCom, Inc.*, Case No. 02-6088 CBM (Mcx) (C.D. Cal.)

2. *West Virginia Investment Management Board v. WorldCom, Inc.*, Case No. 02:02-1001 (S.D. W. Va.)

3. *Board of Trustees of the Teachers' Retirement System of the State of Illinois v. WorldCom, Inc.*, Case No. 1:02-5542 (N.D. Ill.)

4. *State Universities Retirement System of Illinois v. WorldCom, Inc.*, Case No. 1:02-5543 (N.D. Ill.)

5. *Illinois State Board of Investment, et al. v. Bernard J. Ebbers, et al.*, Case. No. 1:02-6789 (N.D. Ill.)

6. *United Food & Commercial Workers Union v. Ebbers, et al.*, Case No. 1:02-2323 (N.D. Oh.)

7. *Public Employees Ret. Sys. of Ohio, et al. v. Ebbers, et al.*, Case No. 02:02-982 (S.D. Oh.)

8. *Alameda County Employees' Ret. Assoc., et al. v. Ebbers, et al.*, Case No. CV 02-9008 CBM (Mcx) (C.D. Cal.)

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9. *Screen Actors Guild - Producers Pension & Health Plans, et al. v. Ebbers, et al.*, Case No. CV 02-9012 CBM (Mcx) (C.D. Cal.)

10. *Wash. St. Inv. Bd. v. Citigroup, Inc., et al.*, Case No. CV02-2358P (W.D. Wa.)

11. *Minn. St. Bd. Inv. v. CitiGroup, Inc., et al.*, Case No. 03-CV-55JMR/FLN (D. Minn.)

12. *Mont. Bd. of Inv. v. Ebbers, et al.*, Case No. CV-02-57-H-CCL (D. Mt.)

13. *Los Angeles Bd. of Fire & Police Pension Commissioners, et al. v. Ebbers, et al.*, Case No. 2-03-853 (C.D. Cal.)

14. *Barnett, et al. v. Ebbers, et al.*, Case No. 3-03-291 (S.D. Miss.)

15. *Clowers, et al. v. Ebbers, et al.*, Case No. 1-03-126 (N.D. Miss.)

16. *Arnold, et al. v. Ebbers, et al.*, Case No. 3-03-409 (S.D. Miss.)

17. *Barkley, et al. v. Ebbers, et al.*, Case No. 3-03-410 (S.D. Miss.)

18. *Barlow, et al. v. Ebbers, et al.*, Case No. 3-03-411 (S.D. Miss.)

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19. *Hamilton, et al. v. Ebbers, et al.*, Case No. 3-03-412 (S.D. Miss.)

20. *Hood, et al. v. Ebbers, et al.*, Case No. 3-03-413 (S.D. Miss.)

21. *Gilkey, et al. v. Ebbers, et al.*, Case No. 4-03-119 (S.D. Miss.)

22. *Albright, et al. v. Ebbers, et al.*, Case No. 5-03-177 (S.D. Miss.)

23. *Maryland-Nat'l Capital Park & Planning Comm'n Employees' Ret. Sys. v. Citigroup, Inc., et al.*, Case No. 8:03-881 (D.Md.)

24. *Heavy & Gen'l Laborers' Locals 472 & 172 Pension & Annuity Funds, et al.*, Case No. 2:03-1338 (D.N.J.)

25. *State of Wisconsin Inv. Bd, et al. v. Citigroup, Inc., et al.*, Case No. 3:02:698 (W.D. Wis.)

26. *Maintenance Employee Teamsters Local 416 Pension Fund v. Ebbers, et al.*, Case No. 1:03-652 (N.D. Ohio)

27. *Franck , et al. v. Sullivan, et al.*, Case No. 1-03-105 (N.D. Miss.)

28. *Abrams, et al. v. Ebbers, et al.*, Case No. 1-03-108 (N.D. Miss.)

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29. *Little, et al. v. Ebbers, et al.*, Case No. 3-3-292 (S.D. Miss.)

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31. *Pac. Life Ins. Co., et al. v. J.P. Morgan Chase & Co., et al.*, No. 8:03-813 (C.D. Cal.)

32. *Maine State Ret. Sys. v. Citigroup, Inc., et al.*, No. 1:03-98 (D.Me.)

33. *Municipal Employees Ret. Sys. of Michigan, et al. v. Citigroup, Inc., et al.*, No. 2:03-72133 (E.D. Mich.)

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2. *The Northwestern Mut. Life Ins.. Co. v. Citigroup, Inc., et al.*, Case No. 03-C-0608-JPS (E.D. Wis.)

3. *Alaska Elec. Pension Fund v. Citigroup, Inc., et al.*, Case No. J03-0014CV(RRB) (D. Alaska)

4. *UFCW Int'l Union - Indus. Pension Fund v. Citigroup, Inc., et al.*, Case No. 03-CV-1526 (D. D.C.)

Bondholder Actions Recently Filed in State Court And Not Yet Conditionally Tranferred by JPML

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3. *Elec. Workers I.B.E.W. Local 701 Pension Plan, et al. v. Ebbers, et al.*, Case No. 03C6227 (N.D. Ill.)

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4. *Iron Workers of W. PA Pension & Welfare Plans, et al. v. Ebbers, et al.*, Case No. 03-1316 (W.D. PA)

5. *W. Pa. Teamsters v. Ebbers*, Case No. 03-1315 (W.D. PA)

6. *New Mexico State Inv. Council, et al. v. Ebbers, et al.*, Case No. CV-03-1028-RB/DJS (D. N.M.)

7. *DuPage County Cement Masons Local 803 Pension Fund v. Ebbers, et al.*, Case No. 03-C6187 (N.D. Ill.)

8. *Inter-Local Pension Fund of the Graphic Communications Int'l Union v. Citigroup, Inc., et al.*, Case No. 03-C6185 (N.D. Ill.)

9. *Alaska Teamster-Employer Pension Trust v. Citigroup, Inc., et al.*, Case No. J03-0019-CV (RRB) (D. Alaska)

10. *Massachusetts State Guaranteed Annuity Fund & Mass. State Carpenters Pension Fund v. Ebbers, et al.*, Case No.: CV 03-5949 SJO (SHSx) (C.D. Cal.)

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1. *Retirement Systems of Alabama v. J.P. Morgan Chase & Co., et al.*, Case No. C-02-A-898-N (M.D. Ala.).

2. *City of Birmingham Ret. & Relief Fund v. Citigroup, Inc., et al.*, Case No. 2:03-994 (N.D. Ala.)

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5. *Illinois Mun. Ret. Fund v. Citigroup, Inc., et al.*, Case No. 03-CV-465-GPM (S.D. Ill.)

NOV 2 0 2003

No. 03-419

In The Supreme Court of the United States

J.P. MORGAN CHASE & CO., et al.,

Petitioners,

v.

THE RETIREMENT SYSTEMS OF ALABAMA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Issues Presented Below and the Decision of the Court of Appeals Below

Respondents respectfully submit that the Petitioners' summary of the issues presented below is incomplete and fails to state correctly the precise decision of the Court of Appeals for the Eleventh Circuit.

The "Question Presented for Review" set out at page *i* of the Petition is:

> Whether the bar imposed by 28 U.S.C. 1334(d) and 1452(b) *on this Court's review* of orders to abstain and remand, or not to abstain, in actions removed from state court on the ground that they fall within federal bankruptcy jurisdiction *violates the Exceptions Clause of Article III of the United States Constitution*. (Emphasis supplied.)

This "Question Presented" was not before or decided by the United States District Court below or by the Court of Appeals.

The Opinion of the United States Court of Appeals for the Eleventh Circuit, filed June 18, 2003, noted that "Defendants contend that *this* court has jurisdiction to review the district court's abstention order and they urge *this* court to hold that the District Court's order constitutes an abuse of discretion." (emphasis supplied.) The court below first concluded "that the statutory bars to appellate review contained in §§ 1334(d) and 1452(b) are constitutional. *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 513-14 (1869); *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 104 (1870) [sic]." Having so decided, the court below concluded "As a result, *we* lack jurisdiction to consider the Defendants' argument that the district court abused its discretion

when it exercised its discretionary abstention power under § 1334(c)(1) and remanded the action to state court." (emphasis supplied.) Thus, the decision below was carefully limited to a holding that *the Court of Appeals for the Eleventh Circuit* lacked jurisdiction to review the district court's statutory, discretionary abstention order and the remand as a consequence of such statutory abstention.

Respondents stated below (at pp. 5-8 of Respondents' Response to Jurisdictional Questions Raised by the Clerk, filed November 6, 2002 in the U.S. Court of Appeals) that the Petitioners' appeal to the Court of Appeals was barred by 28 U.S.C. §§ 1334(d) and 1452(b). Respondents asserted below that Congress has both the power to create tribunals inferior to the Supreme Court and the power to invest such inferior courts with jurisdiction or withhold jurisdiction from such inferior federal courts "in the exact degrees and character which to Congress may seem proper for the public good," *Palmore v. United States*, 411 U.S. 389, 401 (1973) quoting *Cary v. Curtis*, 44 U.S. 236, 245 (Jan. Term 1845). Respondents thus correctly framed the issue before the Court of Appeals as being "whether Defendants have a right of appeal to [the Court of Appeals] (rather than whether Defendants have a right of appeal to the Supreme Court)." The decision of the Court of Appeals thus addressed in its holding the real question, which was the statutory bar of 28 U.S.C. §§ 1334(d) and 1452(b) (similar to the statutory bar of 28 U.S.C. § 1447(d)) to a review *by the Court of Appeals*.

The Petitioners' statement of the question that is here "presented for review" thus incorrectly assumes either that this Court's original jurisdiction was involved (which it was not) or else that a direct mode of review in this

Court of the District Court's decision was sought and barred (which also has not occurred).

The Court of Appeals' holding only relates to the first half of the bar on appellate review (that is, the bar on appeal to a Court of Appeals) contained in 28 U.S.C. §§ 1334(d) and 1452(b). As such, Petitioners' request for review of the Court of Appeals' holding should not implicate any constitutional issue, as to whether the *second* half of the bar on appeals (that is, the bar on this Court's right of review except in certain instances) is valid. In that regard, the United States as Intervenor correctly stated (at pp. 2, 12-13 and 14-19 of its March 10, 2003 Brief filed in the Court of Appeals below) that the portions of 28 U.S.C. §§ 1334(d) and 1452(b) which bar circuit court review are severable from the provisions of those statutes which bar discretionary Supreme Court review of remand and abstention orders:

> This Court [the Court of Appeals] lacks jurisdiction to decide this appeal. Defendants concede that §§ 1334(d) and 1452(b) foreclose circuit court review of the district court's order. Although they have couched their appeal as a constitutional challenge, this does not give this Court jurisdiction over the present appeal. Defendants' sole constitutional complaint is that Congress exceeded its Exception Clause power by shielding abstention orders from *Supreme Court* review. Defendants do not argue, because they cannot, that Congress lacks power to strip this Court [of Appeals] of jurisdiction. Thus, even accepting as correct Defendants' argument that the Supreme Court must have jurisdiction, the argument does not implicate or alter the fact that §§ 1334(d) and 1452(b) clearly deprive this Court [of Appeals] of jurisdiction over this appeal.

> . . . defendants are mistaken to the extent that they assume (without argument) that the alleged constitutional defect would warrant striking down §§ 1334(d) and 1452(b) in their entirety.
>
> Here, there is no evidence that Congress would not have sought to preclude circuit court review independently of its preclusion of discretionary Supreme Court review of remand and abstention orders. . . . there is no question that the clauses would be severable . . . accordingly, even if it were unconstitutional to bar Supreme Court review of abstention orders, those portions of §§ 1334(d) and 1452(b) would be stricken from the two statutes, leaving the constitutional portions intact.

REASONS FOR DENYING THE PETITION

ARGUMENT

I. NONE OF THE CRITERIA SET OUT IN RULE 10 OF THE RULES OF THIS COURT WHICH MIGHT JUSTIFY REVIEW ON WRIT OF *CERTIORARI* ARE PRESENT IN THIS CASE.

Petitioners have not demonstrated that the decision below is in conflict with either: a relevant decision of this Court; a decision of another United States court of appeals; or a decision of a state court of last resort. The Petition does not demonstrate that the question presented for review (at p. *i* of the Petition) involves lower court conduct that has so far departed from the accepted and usual course of judicial proceedings (or sanctioned such a departure by a lower court), as to call for an exercise of this Court's supervisory powers, or is an important

question which has not been, but should be, settled by this Court.

While citing divergent decisions in different *district* courts on facts-and-circumstances based determinations whether or not to abstain under 28 U.S.C. § 1334(c), the Petition wholly fails to demonstrate that the opinion of the Court of Appeals below is in conflict with relevant decisions of this Court or a decision of another United States Court of Appeals or a decision of a state court of last resort on the same matter. Moreover, the record is devoid of any support for the Petitioners' assertions that the several district court WorldCom cases are "identical" and the circumstances favoring abstention or not are "identical" (Petition p. 6). Here, the District Court's discretionary abstention ruling fits in the mainstream of jurisprudence, especially given the fact that Respondents' case is primarily based on four counts of state law violations and two counts of violations of the Securities Act of 1933 (under which the state courts may exercise concurrent jurisdiction), as recognized by the remand opinion, and the Petition fails to cite another case that involves Respondents' specific situation or state law claims.[1] Not only does the Petition fail to cite any 28 U.S.C. § 1334(c) and (d) statutory abstention decision of this Court, of a Court of Appeals, or of the highest court of a state, which is contrary to the

[1] The District Court's opinion describes Respondents' suit as follows: "RSA's Amended Complaint alleges that the Defendants violated the Alabama Securities Act, *Ala. Code* §§ 8-6-1 *et seq.*, the Alabama common law of aiding and abetting, the Alabama statutory and common law of fraud, including *Ala. Code* §§ 6-5-100 *et seq.*, and Sections 11, 12(a)(2) and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*(a)(2), & 77*o*." (Footnotes omitted.)

decision of the District Court and of the Eleventh Circuit below, but the Petition: (1) erroneously applies non-statutory abstention doctrines to this statutory abstention proceeding; and (2) fails to show that the decision of the District Court is a severe "departure from the accepted and usual course of judicial proceedings" so as "to call for an exercise of this Court's supervisory power." The Petition would invite this Court, in the face of strong Congressional policy favoring the nonreviewability of remand orders and statutorily-authorized abstention rulings, to embark on a road of reviewing individualized 28 U.S.C. § 1334(c)(1) discretionary abstentions and 28 U.S.C. § 1452(b) equitable-factors abstentions.

There is, in fact, no split of authority in decisions of the Courts of Appeals on the non-appealability of abstentions in remand situations, and such decisions do not avoid the bar against appellate review by holding the ban unconstitutional. The Courts of Appeals have repeatedly upheld the proposition that a district court's discretionary decision to abstain under 28 U.S.C. § 1334(c)(1) and (d), or to remand pursuant to abstention under 28 U.S.C. § 1452(b), is not reviewable by appeal, without finding such bar to be unconstitutional. *See, e.g., Wallace v. Hastings*, No. 02-5080, 2003 WL 22211612 (10th Cir. Sep. 25, 2003); *In re Cody, Inc.*, 338 F.3d 89 (2d Cir. 2003); *Bartlett v. Arthur Andersen, LLP,* No. 01-17327, 2003 WL 173521 (9th Cir. Jan. 24, 2003); *In re Cathedral of the Incarnation*, 99 F.3d 66, 68-69 (2d Cir. 1996); *In re Magnolia Gas Co., L.L.C*, Nos. 01-6001, 01-6093, 2002 WL 497417 (10th Cir. Apr. 3, 2002); *Christo v. Padgett*, 223 F.3d 1324, 1332 n.8 (11th Cir. 2000), *cert. denied,* 531 U.S. 1191 (2001); *Ariail Drug Co., infra; In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 389 n.14 (3d Cir. 2002); *In re Adams*, 809 F.2d 1187, 1188 (5th Cir. 1987); *Allied Signal*

Recovery Trust v. Allied Signal, Inc., 298 F.3d 263 (3d Cir. 2002); *In re Stroh*, No. 00-56555, 2002 WL 826071 (9th Cir. Apr. 30, 2002); *Hawking v. Ford Motor Credit Co.*, 210 F.3d 540 (5th Cir. 2000); *In re United States Brass Corp.*, 110 F.3d 1261, 1265-66 (7th Cir. 1997); *cf. In re Celotex Corp.*, 124 F.3d 619, 625 (4th Cir. 1997).

Just as the Eleventh Circuit, below, declined to find unconstitutional the statutory bar on appellate review of a remand order, so the Fifth Circuit also ruled, in *Doleac v. Michalson*, 264 F.3d 470 (5th Cir. 2001). The Petition refers us to no contrary decisions.

II. THE CHALLENGED STATUTES (28 U.S.C. §§ 1334(d) AND 1452(b)) DO NOT UNCONSTITUTIONALLY "FORBID ALL ACCESS TO REVIEW BY THIS COURT" AS THE PETITION (AT PP. 14-15 AND 27-29) ARGUES.

The Petition erroneously argues (at pp. 14-15 and 27-29) that the challenged statutes (28 U.S.C. §§ 1334(d) and 1452(b)) unconstitutionally forbid all access to review of this case *by this Court*.

The district court's decision merely determined which court – state or federal – will adjudicate the claims and defenses in the first instance. If Petitioners (Defendants below) are dissatisfied with rulings of or the final judgment entered by the state court, they may appeal through the state court judicial system and may ultimately seek *certiorari* review by this Court, pursuant to 28 U.S.C. § 1257.

Moreover, as Respondents and the United States argued below, 28 U.S.C. §§ 1334(d) and 1452(b) do not preclude a party from seeking mandamus. *See, e.g.,*

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 350 (1976) in which this Court held that mandamus was available, notwithstanding 28 U.S.C. § 1334(d), to review a district court's order granting a motion to remand on "grounds not provided by statute" [the fact that the district court's docket was crowded]; *Dow Corning Corp. v. Dow Chem. Co.*, 113 F.3d 565, 569 (6th Cir. 1997) (construing § 1334(d) to permit mandamus review), *cert. denied,* 522 U.S. 977 (1997); and *Allied Signal*, 298 F.3d at 270-71 (determining that mandamus was available to review a remand order issued by a district court on grounds not authorized by statute in excess of the district court's statutory authority).

Additionally, under the so-called "substantive law exception," remands to state court based upon determinations of substantive rights of the parties may be reviewed by an appellate court, *see, City of Waco v. United States Fidelity & Guar. Co.,* 67 F.2d 785 (5th Cir. 1933), *dismissal of appeal of remand order affirmed and dismissal of appeal of trial court's dismissal of merits claim reversed,* 293 U.S. 140 (1934); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1285 (11th Cir. 1999); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984).

Further, 28 U.S.C. § 1334(d) permits appellate review of "mandatory" abstention orders issued pursuant to 28 U.S.C. § 1334(c)(2).

A strong Congressional policy against "ricocheting" cases and the concomitant strain on judicial resources has repeatedly been recognized, as for example in *In re Loudermilch*, 158 F.3d 1143, at 1145 n.3 (11th Cir. 1998):

In enacting 28 U.S.C. § 1447(d), Congress contemplated that district courts might make erroneous remand decisions. The statute's approach respects the province of both the district courts (because their orders are not reviewable by federal appellate courts) and the state courts (because the statute is intended to prevent a case from repeatedly ricocheting in and out of state court based on the most recent determinations of a federal court). This approach also prevents a waste of state and federal judicial resources.[2]

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[2] *See also*, *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 136 (1995) ("In sum, a 'strong congressional policy against review of remand orders,' *Sykes*, 834 F.2d, at 490, underlies §§ 1447(d) and 1452(b).") (Justices Ginsberg and Stevens, concurring); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 354-55 (1976) (Dissenting opinion of Justice Rehnquist): "[T]he limitation found in § 1447(d) has remained substantially unchanged since its enactment in 1887, and this Court has consistently ruled that the provision prohibits any form of review of remand orders. Congress' purpose in barring review of all remand orders has always been very clear – to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand. The removal jurisdiction extended by Congress works a significant interference in the conduct of litigation commenced in state court. While Congress felt that making available a federal forum in appropriate instances justifies some such interruption and delay, it obviously thought it equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible. If this balanced concern is disregarded, federal removal provisions may become a device affording litigants a means of substantially delaying justice."

III. CONGRESS HAS PLENARY POWER TO CONFER JURISDICTION UPON STATE COURTS TO HEAR AND DECIDE, IN THE FIRST INSTANCE, CASES ARISING UNDER THE CONSTITUTION OR UNDER THE LAWS OF THE UNITED STATES; AND NO SUPREMACY CLAUSE ISSUES ARE INVOLVED HERE.

As Professors Wright, Miller and Cooper have observed in 13 Federal Practice and Procedure at p. 11 (2d Edition) (1984):

> It is interesting that Congress proceeded immediately to give the circuit courts jurisdiction in diversity cases, but that no jurisdiction was conferred on the lower federal courts in cases arising under the Constitution or law of the United States. Except for a one-year interlude, it was not until 1875 that there was a general grant of federal question jurisdiction. These cases could be brought only in the state courts.

To the extent that Petitioners are directly and indirectly challenging the bar on appellate review of remand orders as infringing on this Court's powers under the Supremacy Clause,[3] 28 U.S.C. §§ 1334(d) and 1452(b) do not legitimately involve that concern. A federal district court's ruling on statutory abstention under a *federal*

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[3] *See, e.g.*, Petition at p. 12 ("Defined in this manner, exceptions do not compromise this Court's function as guarantor of uniformity of federal law. . ." and "Statutes that completely curtail this Court's power to review particular questions of federal law . . ."), and p. 13 ("The Constitution created this Court so that discord of this nature could be alleviated."), and pages 15-17 generally.

statute does not involve a construction of the *Constitution*, and therefore does not implicate this Court's power to serve as ultimate arbiter of what the *Constitution* (as opposed to what a *statute*) means. Moreover, a *federal* lower court's ruling on *federal statutory* abstention does not implicate any overlap or cross-purposes between *state* and *federal* law, and therefore does not implicate this Court's power, under the Supremacy Clause, to serve as ultimate arbiter of any alleged conflict between *state* and *federal* law and to avoid the threat to uniformity posed by varying state laws or state supreme court decisions. Only a garden variety ruling under a *federal* statute made by a *federal* court is here involved.

IV. CONGRESS HAS PLENARY POWER TO BAR AN APPEAL FROM A REMAND ORDER WHICH MERELY DECIDES WHICH COURT – STATE OR FEDERAL – WILL FIRST HEAR AND DECIDE THE MERITS OF A CASE; AND THERE IS NO VESTED CONSTITUTIONAL RIGHT IN A MODE OF PROCEDURE.

At common law, before the adoption of the constitution, and before Congress enacted statutes creating the inferior federal courts, there was no right to remove a case initially filed in state court to federal court, no right to seek remand to state court, no right to seek an abstention order, and no right to appeal. As this Court long ago recognized in *Gaines v. Fuentes,* 92 U.S. 10, at 18 (1876); and in *Great Northern Ry. Co. v. Alexander,* 246 U.S. 276, 280 (1918), it rests entirely with Congress to decide whether a federal court may assert jurisdiction over a case initially brought in state court, at what time such power may be asserted, and at what stage of the proceedings,

whether before trial or after the state court has entered judgment. Congress, which has enacted statutes creating the inferior federal courts and statutes permitting removal to the federal courts, remand to the state courts, abstention, and appeals, has plenary power with respect to such removals, remands, abstention orders, appeals, and the appellate jurisdiction (if any) of the federal courts, including the right to permit appeals only after final judgment by the highest state court and the right to bar an appeal from an order which merely decides which court – state or federal – will, in the first instance, hear and decide the merits of the claims and defenses asserted in the case.

The right of a party under certain statutorily-defined circumstances to remove a case from state court to an inferior federal court, or to seek remand or to seek an abstention order was unknown to the framers of our constitution. As Professors Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper have observed: "The right to remove a case from a state to a federal court is purely statutory and the terms of its availability are entirely dependent on the will of Congress." 14B Federal Practice § 3721 (3d ed. 1998). The statutory right of removal from a state court to a federal court is not a constitutional right nor a right falling within the original jurisdiction of the Supreme Court. Such a limited statutory right is merely a procedural right which Congress is constitutionally empowered to grant, deny, or carve out of the appellate authority of the Courts of Appeals and of the United States Supreme Court.

As this Court held, in an opinion delivered by Mr. Justice Field, in *Gaines*, 92 U.S. at 18:

> . . . it rests entirely with Congress at what time the power [to seek adjudication by a federal court] may be invoked and upon what conditions; whether originally in the Federal Court, or after suit brought in the State Court; and, in the latter case, at what stage of the proceedings; whether before issue or trial by removal to a Federal Court, or after judgment upon appeal or writ of error.

In *Great Northern Ry.*, 246 U.S. at 280, in an opinion delivered by Mr. Justice Clarke, this Court held as follows:

> It is, of course, familiar law that the right of removal being statutory, a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress. *Gold Washing, et., Co. v. Keyes*, 96 U.S. 199, 24 L. Ed. 656; Jud. Code, c. 3, §§ 28, 39.

Purely statutory creations of removal and remand (which were unknown at common law) are procedural, not substantive, rights and proceedings, and thus are subject to the established rule that there is no vested constitutional right to a mode of procedure. *See, e.g., Doleac v. Michalson*, 264 F.3d 470 (5th Cir. 2001):

> Furthermore, the Fifth Amendment confers no due process right to appellate review in a federal forum. The remand order affects only the procedural question as to the forum in which Dr. Michalson will seek to defend his interests, and "[n]o one has a vested right in any given mode of procedure". *Crane v. Hahlo*, 258 U.S. 142, 147, 42 S.Ct. 214, 66 L.Ed. 514 (1922); see *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a

> substantive interest to which the individual has a legitimate claim of entitlement."). There is no due process right to appellate review even in circumstances in which much more is at stake than a litigant's preference for a federal forum: even in criminal cases, appellate review does not constitute "a necessary element of due process of law". *McKane v. Durston*, 153 U.S. 684, 687, 14 S.Ct. 913, 38 L.Ed. 867 (1894).

Id. at 492-93 (footnote omitted). *See also Ex parte Collett*, 337 U.S. 55, 71 (1949) ("No one has a vested right in any given mode of procedure," citing *Crane v. Hahlo, supra*); *Gwin v. United States,* 184 U.S. 669, 674 (1902) ("But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary.")

V. THE PETITIONERS ERRONEOUSLY ARGUE THAT "THIS COURT HAS SANCTIONED CONGRESS' EXERCISE OF THE EXCEPTIONS POWER ONLY WHERE THE 'CLASSES OF CASES' EITHER (i) WERE DRAWN IN TERMS NEUTRAL WITH RESPECT TO LEGAL CONTENT OR (ii) INVOLVED EXCEPTIONS AS TO REVIEWING ISSUES OF FACT."

The Petition engages in wishful thinking in arguing (at p. 21) "This Court has sanctioned Congress's exercise of the Exceptions Power only where the 'Classes of Cases' either (i) were drawn in terms neutral with respect to legal content or (ii) involved exceptions as to reviewing issues of fact."

That argument ignores the fact that the first Congress did not authorize the Supreme Court to review all judgments entered by lower federal courts. The 1789 Act did not provide for appellate review of federal criminal convictions. The Supreme Court has recognized that the Judiciary Act of 1789, ch. 20, 1 Stat. 73, is "[a] contemporaneous exposition of the constitution, certainly of not less authority than [The Federalist]." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821) (Marshall, C.J., for the Court); *see also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (Judiciary Act of 1789 "was passed by the first congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning"); *Ames v. Kansas*, 111 U.S. 449, 463-464, 469 (1884); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

Subsequent Congresses over the next century restricted or alternately expanded the Supreme Court's appellate jurisdiction, *but until Congress granted appellate review of issues of law, there was no provision for appeal on such issues*. In 1802, the Supreme Court was given jurisdiction in federal criminal cases where the judges of the circuit court were divided on a question of law. Act of Apr. 29, 1802, ch. 31, 6, 2 Stat. 159-161. An 1889 statute permitted the Court to exercise appellate review in federal capital cases. Act of Feb. 6, 1889, ch. 113, 6, 25 Stat. 656. The Court's appellate jurisdiction was further extended in 1891 to include "cases of conviction of a capital or otherwise infamous crime." Act of Mar. 3, 1891 (Evarts Act), ch. 517, 5, 26 Stat. 827. The Evarts Act also authorized the Court to review, by appeal or writ of error, the decision of a district or circuit court in "any case that involves the construction or application of the Constitution of the

United States"; "any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question"; and "any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." 5, 26 Stat. 828. In 1914, the Supreme Court was given appellate jurisdiction over state court decisions upholding a federal claim. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

More recently, Congress has conferred on the Court broad discretion to review or decline to review decisions of the federal courts of appeals, and decisions by a state court of last resort on issues of federal law. *See* 28 U.S.C. §§ 1254, 1257. History demonstrates that Congress has never thought that the Constitution itself mandates appellate jurisdiction over all lower court decisions resting on federal law. *See* the Supreme Court 1995 Term, *Congressional Power to Restrict The Supreme Court's Appellate Jurisdiction*, 110 Harv. L. Rev. 277, 283 (1996) commenting that ("John Marshall reported to the Virginia [constitutional] ratifying convention the expectations of the Framers regarding the Exceptions Clause, declaring that 'Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people.' ").

Petitioners' attempt to distinguish cases supporting Congressional authority to limit Supreme Court appellate jurisdiction by characterizing them as relating to review of fact issues will not stand analysis. There is no such limitation in the Exceptions Clause. The issue here is the Court's *appellate* jurisdiction, under *Section 2* of Art. III, not this Court's *original* jurisdiction under Section 1. The

Exceptions Clause of Section 2 expressly grants Congress the right to remove from the Supreme Court's *appellate* jurisdiction "both as to law and fact" of the right to review a lower federal court's decisions. The Exceptions Clause does *not* say, "Congress can only create an exception if the lower court decision turned solely on issues of fact." The phrase in Section 2 of Art. III, "with such exceptions . . . as the Congress shall make," modifies the entire jurisdictional statement, "appellate jurisdiction, both as to law and fact," and not just half of it (were it otherwise, then which half?). Such a reading is consistent with Hamilton's explanation in *Federalist No. 81*, as well as this Court's statement in *Luckenbach S.S. Co., Inc. v. United States*, 272 U.S. 533, 536-37 (1926), where, after pointing out that "appellate review is not essential to due process of law, but is a matter of grace," this Court stated, quoting from *The Francis Wright,* 105 U.S. 381, 386 (1882),

> 'Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but *particular classes of questions may be subjected to re-examination and review, while others are not.* To our minds it is no more unconstitutional to provide that issues of fact shall not be retried in any case, *than that neither issues of law nor fact shall be retried* in cases where the value of the matter in dispute is less than $5,000. *The general power to regulate implies power to regulate in all things. The whole of a civil law appeal may be given, or a part.* The constitutional requirements are all satisfied if one opportunity is had for the trial of all parts of a case. Everything beyond that is matter

> of legislative discretion, not of constitutional right.'

Id. (emphasis added).

VI. PRIOR DECISIONS OF THIS COURT MAKE IT CLEAR THAT CONGRESS HAS BROAD DISCRETION TO ENACT STATUTES WHICH EXPAND, LIMIT, OR REGULATE THIS COURT'S APPELLATE JURISDICTION. THE "EXCEPTIONS" CLAUSE DOES NOT BAR CONGRESS FROM ENACTING STATUTES WHICH LIMIT OR BAR REVIEW BY APPEAL OR CERTIORARI OF A DISTRICT COURT'S DETERMINATION WITH RESPECT TO WHICH COURT – STATE OR FEDERAL – WILL HEAR THE MERITS OF THE CLAIMS IN THE FIRST INSTANCE.

As Respondents and the United States as Intervenor argued below, the Supreme Court has consistently recognized that Congress enjoys broad discretion to limit, regulate, and devise exceptions to the Court's appellate jurisdiction. *See, e.g., United States v. More*, 7 U.S. (3 Cranch) 159, 173 (Feb. Term 1805) (Marshall, C.J., for the Court) (Supreme Court's jurisdiction "has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described. * * * This court, therefore, will only review those judgments of the circuit court of Columbia, a power to re-examine which, is expressly given by law."); *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (Feb. Term 1810) (Marshall, C. J., for the Court) ("The appellate powers of this court are not given by the judicial act. They are

given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject."); *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (Jan. Term 1847) ("By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress"); *Daniels v. Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1866) ("[I]t is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation."); *St. Louis I.M. & S. Ry. Co. v. Taylor*, 210 U.S. 281, 292 (1908) ("Congress has regulated and limited the appellate jurisdiction of this court over the state courts * * * , and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power."); *Yakus v. United States*, 321 U.S. 414, 472-473 (1944) (Rutledge, J., dissenting) ("Congress has plenary power to confer or withhold appellate jurisdiction"); *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) ("Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is sub judice."); *Flast v. Cohen*, 392 U.S. 83, 109 (1968) (Douglas, J., concurring) ("Congress may largely fashion [our appellate jurisdiction] as Congress desires by reason of the express provisions of Section 2, Art. III.").

Felker v. Turpin, 518 U.S. 651 (1996) does not require a different result here. No constitutionally-protected writ of *habeas corpus* is here involved, and, as shown in Section II of this brief *supra*, 28 U.S.C. § 1334(d) does not foreclose

a number of alternative methods of review in appropriate circumstances. *Felker* reaffirms the general principles found in the cases above cited.

VII. THIS COURT'S PRIOR DECISIONS IN *MANGUS v. MILLER*, 317 U.S. 178 (1942) AND *THOMPSON v. MAGNOLIA PETROLEUM CO.*, 309 U.S. 478 (1940) ARE WHOLLY IRRELEVANT, AND DO NOT SUPPORT OR WARRANT THE ISSUANCE OF A WRIT OF *CERTIORARI* IN THIS CASE.

At p. 14 and at pp. 25-26 of the Petition, Petitioners argue that this Court's issuance of writs of *certiorari* in *Mangus v. Miller*, 317 U.S. 178 (1942) and *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940) demonstrate that this Court has granted *certiorari* to consider the propriety *vel non* of abstention in the context of bankruptcy-related litigation.

Neither of those cases involved abstention in the context of bankruptcy-related cases. Neither of those cases involved a district court's decision to abstain from exercising federal jurisdiction in any context, especially a context of statutory vesting of discretion in the district court. Neither of those cases involved the statutes (28 U.S.C. §§ 1334(d) and 1452(b)) challenged by Petitioners. Neither of those cases involved the question whether appellate review by appeal or petition for a writ could be restricted by an act of Congress. Neither of those cases involved an evaluation of the strong Congressional policy underlying legislatively-imposed bars on appellate review under statutes such as 28 U.S.C. §§ 1334(d), 1447(d) and 1452(b).

VIII. THE PETITION ERRONEOUSLY APPLIES NON-STATUTORY ABSTENTION CASELAW TO § 1334(c)(1) ABSTENTION.

At pp. 13 and 25-27, as they did in the Court of Appeals below, Petitioners seek to substitute judicially-created abstention doctrines, particularly that enunciated in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), for the statute that applies in this statutory-abstention case.

Congress set out the following *statutory bases* for statutory abstention: (1) "any equitable ground"; (2) "interest of justice"; (3) "interest of comity"; and (4) "respect for State law." 28 U.S.C. §§ 1334(c)(1), 1452(b). Those statutory factors do not show up in any consideration or discussion in *Quackenbush, Colorado River* [*Colorado River Water Conservation Dist. v. United State*s, 424 U.S. 800 (1976)] or other judicial-doctrine abstention cases relied upon by Petitioners, because none of such decisions involved an abstention based on such statutes. But those statutory factors provide the exact express authority that the District Court needed for its abstention here, and the District Court followed the statutory guidance to the letter. The District Court did not stray from those statutory factors into any other basis for abstention, as occurred in *Quackenbush* and *Thermtron, supra.*

Thus, it is not surprising that the Court of Appeals in this case did not apply *Quackenbush* (heavily relied upon by Petitioners) to this case, nor that the other Courts of Appeals which have addressed the issue have also consistently held that *Quackenbush* and other judicial-doctrine abstention cases do not supply the measure of abstention under 28 U.S.C. §§ 1334(c)(1) or 1452(b). *See, e.g., In re Cathedral of the Incarnation*, 99 F.3d 66, 68-69 (2d Cir.

1996) (*Quackenbush* does not apply to § 1452(b) abstention); *In re United States Brass Corp.*, 110 F.3d 1261, 1265-66 (7th Cir. 1997) (same); *Allied Signal Recovery Trust v. Allied Signal, Inc.*, 298 F.3d 263, 268 (3d Cir. 2002) (same, also finding that § 1334(c)(1) grounds will constitute equitable grounds under § 1452(b)); *cf. Ariail Drug Co., Inc. v. Recomm Int'l Display, Inc.*, 122 F.3d 930, 933-35 (11th Cir. 1997) (noting *Quackenbush* but not applying it where district court remanded under both § 1334 and § 1452).

IX. THE PETITION SHOULD BE DENIED BECAUSE THIS CASE, IN THE STATE COURT SYSTEM FOR THE PAST FOURTEEN MONTHS, HAS BEEN GOING STEADILY FORWARD TOWARD TRIAL.

When this case was remanded to the Circuit Court of Montgomery County, Alabama by the District Court's September 24, 2002 order, neither the Petitioners nor any other party sought a stay of this case pending the appeal to the Eleventh Circuit. Thus, throughout the pendency of the Eleventh Circuit consideration of Petitioners' appeal, and proceedings initiated by them in this Court, the parties have been actively litigating the merits of the case, including conducting discovery and waging several interlocutory appeals and mandamus proceedings in the Alabama Supreme Court, on a separate track from these federal proceedings. *See, e.g., Ex parte Ebbers and Ex parte Salomon Smith Barney, Inc. et al. (In re Retirement Systems of Alabama et al. v. J. P. Morgan Chase & Co. et al.)*, Nos. 1020931, 1021008, 2003 WL 21570770 (Ala. July 11, 2003) (affirming trial court's denial of stay for the Investment Bank Defendants). Respondents respectfully

submit that it would be unjust and cause a substantial delay and disruption, for this case now to swing back to an entirely different court system, assuming that this Court was otherwise willing to consider entertaining an exploration of the constitutionality of 28 U.S.C. §§ 1334(d) and 1452(b). Would this Court hold such provisions unconstitutional on their face, or merely as applied? Would the result be a *de facto* re-removal to the district court (where the Petitioners would undoubtedly move under 28 U.S.C. § 1407 for a transfer of this case to New York where the MDL proceeding is pending)? Would this Court order a remand to the district court to make further findings or evaluations? Respondents believe that addressing alleged constitutional issues in this case is unwise, causes a host of problems that simply do not need to be created or determined, and would contravene the principle that constitutional issues should not be reached in advance of the necessity of deciding them. *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 99 (1981); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46 (1988).

CONCLUSION

This case presents no precedent-setting or precedent-shattering situation, nor any bar of the exercise of original jurisdiction of this Court, nor any threat to this Court's powers under the Supremacy Clause. This case merely involves a district court's exercise of equitable discretion as permitted by statute, in an interlocutory ruling, to refrain from exercising jurisdiction to try a case based primarily on state law that had initially been properly

filed in state court; and any judgment in the state court will be subject to various modes of review, perhaps even review by certiorari in this Court. This proceeding in fact illustrates the wisdom of Congressional policy, cited *supra*, disapproving of tactical forum maneuvering that proliferates interlocutory decisions bouncing cases between state and federal trial courts, taxing the resources of the judiciary and the parties. For the reasons stated above, Respondents respectfully submit that the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

J.P. MORGAN CHASE & CO., *et al.*,

Petitioners,

v.

THE RETIREMENT SYSTEMS OF ALABAMA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for Petitioners was set forth at page *iii* of their Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

The Petition raises the highly important question whether Congress has the power to foreclose this Court's ability to review classes of decisions by inferior Article III courts based on the legal content of those decisions. Petitioners submit that such foreclosure violates the Exceptions Clause, U.S. Const. art. III, § 2, cl. 2. The statutes at issue, 28 U.S.C. §§ 1334(d) and 1452(b), *completely* withdraw from this Court's scrutiny district court decisions to abstain from federal bankruptcy jurisdiction, including where, as here, the district court justifies abstention on grounds of comity with state interests. Thus, the statutes not only strip this Court of the appellate jurisdiction the Constitution secures to it, they do so in an area of law that demands sensitive balancing of state and federal interests in decisions governing the exercise of federal jurisdiction.

The urgency of review here is further underscored by the statutes' real world consequences. This Court, through Justice Story, once explained that it was essential that one tribunal finally and conclusively decide federal questions to ensure uniformity in the interpretation of federal law. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816). The *WorldCom* litigation is an example of the doctrinal confusion and discordant rulings that Justice Story's opinion decries. The absence of appellate review over bankruptcy abstention decisions has spawned divergent case law at the district court level, with some district courts (such as the district court below) making substantial departures from settled abstention doctrine. These discordant rulings result not from application of the same legal principles to variant facts, but from disagreement over the substance of the legal principles themselves.

Respondents' rejoinder is diversionary. In discussing the criteria for granting review under this Court's Rule 10, they principally assert that this Court should decline review because there is no circuit conflict. (*See* Brief in Opposition ("Opp. Br.") at 4-7.) But Petitioners never relied on the logic of circuit

conflicts to justify this Court's review. Indeed, such a showing would be impossible because to date, aside from the Eleventh Circuit Court of Appeals, no other court has ever ruled on the question here presented.[1]

Respondents thus fail to counter Petitioners' showing that the question presented is in and of itself important. Nor can they dispute that abstention decisions in the district courts are discordant, a fact starkly demonstrated by the *WorldCom* litigation.[2] Respondents' at best meager showing confirms that a grant of certiorari in this case is warranted.

I. The Question Was Presented and Decided Below

Respondents contend that the question presented in the Petition "was not before or decided by the United States District Court below or by the Court of Appeals." (Opp. Br. at 1.) The statement concerning the court of appeals is demonstrably false; the statement about the district court is true, but irrelevant.

The district court could not have decided the question presented in the Petition because a challenge to the constitutionality of a statute that bars appellate review is not

1. In this vein, Respondents cite a string of circuit decisions (*see* Opp. Br. at 6-7) to suggest that the cases unanimously stand opposed to Petitioners' position. But none of the cited cases addressed the question presented by the Petition. These cases held unremarkably that 28 U.S.C. § 1334(d) and/or 28 U.S.C. § 1452(b) bar appellate review of abstention decisions.

2. Respondents remark that "the Petition fail[s] to cite any 28 U.S.C. § 1334(c) and (d) statutory abstention decision of this Court, of a Court of Appeals, or of the highest court of a state, which is contrary to the decision of the District Court and of the Eleventh Circuit." (Opp. Br. at 5-6.) The Petition amply demonstrates that the district court's opinion is at odds with abstention principles and that it clashes with other district court opinions. Otherwise, a search for appellate opinions criticizing the district court's decision would be futile, given the statutory bar on appeals. Similarly, the Eleventh Circuit's decision does not conflict with any other because, as explained, no other case addresses the Exceptions Clause question.

ripe until the district court has entered a final order. *See Doleac ex rel. Doleac v. Michalson*, 264 F.3d 470, 492 (5th Cir. 2001). The first opportunity to raise the question, therefore, was before the court of appeals, which is precisely what Petitioners did. That Petitioners raised an Exceptions Clause challenge before the Eleventh Circuit cannot in good faith be disputed. It is unnecessary even to take the modest step of looking at the record below because Respondents' brief confirms this fact. The lengthy passage Respondents quote from the United States' brief in the court of appeals in part states: "Defendants' [i.e., Petitioners'] sole constitutional complaint is that Congress exceeded its Exception Clause power by shielding abstention orders from *Supreme Court* review." (Opp. Br. at 3 (emphasis in original).)

There also can be no question that the court of appeals decided the Exceptions Clause question. Citing *Felker v. Turpin*, 518 U.S. 651 (1996), the court of appeals first held that it had jurisdiction to determine the constitutionality of 28 U.S.C. §§ 1334(d) and 1452(b).[3] It then held that the statutes were constitutional on the authority of *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), both of which were Exceptions Clause cases. If the court of appeals was not deciding the Exceptions Clause issue, there would have been no reason for it to refer to these decisions.

In the face of this clear record, Respondents attempt to obfuscate the issue by asserting that the Eleventh Circuit addressed only the constitutionality of the statutes' bar on appellate review by courts of appeals. (*See* Opp. Br. at 2-3.) Here, Respondents conjure a "severability" hypothesis to state that the court of appeals could have ruled (and in fact did rule)

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3. Therefore, when the court of appeals stated that it lacked jurisdiction to decide whether the district court's abstention was proper (*see* Opp. Br. at 1-2), it was merely stating that it had already concluded that there was no Exceptions Clause violation and that the statutory bar on appellate review of abstention-based remand orders remained in force. Respondents' contrary gloss misapprehends the court of appeals' decision.

on the constitutional validity of the prohibition on its review without actually reaching the legitimacy of the foreclosure of this Court's appellate jurisdiction. (*See id.* at 3.) This argument is fundamentally flawed because, as explained, the Eleventh Circuit actually ruled on the Exceptions Clause question and, therefore, on the validity of the statutes' prohibition on review by this Court. In all events, the distinction Respondents seek to draw is at best metaphysical because, in the context of bankruptcy abstention orders, foreclosure of appellate review in the courts of appeals itself would result in an Exceptions Clause violation. The reason stems from the manner in which Congress has regulated the appellate jurisdiction of the federal courts.

As a general matter, for cases coming through the federal system, the certiorari or certification jurisdiction of this Court is properly invoked only with respect to cases in the courts of appeals. *See* 28 U.S.C. § 1254. The courts of appeals, in turn, have jurisdiction to review final decisions of the district courts "except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. Therefore, litigants may not as a general matter repair to this Court upon disappointment with a result in a district court. Direct appeal from a district court to the Supreme Court must be specifically authorized by statute. Such statutes exist to be sure, *see* 28 U.S.C. § 1253 (permitting direct appeals to this Court from orders granting or denying injunctions in civil actions required by an Act of Congress to be heard by a district court of three judges); 28 U.S.C. § 2284 (requiring a district court of three judges to hear actions challenging the constitutionality of congressional district apportionments); 47 U.S.C. § 555(c) (constitutional challenges to 47 U.S.C. § 534 or 535 to be heard by a district court of three judges), but there is none that permits direct review in the circumstances of this case.

Thus, with respect to the statutes at issue here, to bar courts of appeals from reviewing abstention orders is tantamount to withdrawing such orders from this Court's scrutiny, which

amounts to an Exceptions Clause violation. Thus, Respondents' "severability" hypothesis is meritless even on its own terms.

II. The Jurisdiction-Stripping Provisions of 28 U.S.C. §§ 1334(d) and 1452(b) Violate the Exceptions Clause

Respondents offer miscellaneous assertions attacking the substance of Petitioners' Exceptions Clause arguments. The assertions are mostly irrelevant and none has merit.

1. Respondents claim that Petitioners argue that 28 U.S.C. §§ 1334(d) and 1452(b) "forbid all access to review of this case" (Opp. Br. at 7) in this Court. This is a severe overstatement. Petitioners never have suggested that issues properly raised and preserved in a remanded action cannot be the subject of a petition for certiorari under 28 U.S.C. § 1257. Petitioners point *only* to what §§ 1334(d) and 1452(b) actually foreclose, which is review of abstention and remand decisions by federal district courts. This distinction is critical because abstention orders do *not* form part of the remanded action and, therefore, contrary to Respondents' supposition, cannot be the subject of a certiorari petition under § 1257 from the final decision of a state court of last resort. (*See* Opp. Br. at 7).

Respondents similarly misapprehend the relevance of mandamus and the *Waco* doctrine. The statutory language, which forbids review "by appeal or otherwise" of decisions to abstain or not to abstain, encompasses mandamus. *See In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 388-89 (3d Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003); *In re United States Brass Corp.*, 110 F.3d 1261, 1266 (7th Cir. 1997) (Posner, J.). Mandamus review is possible when the appeal does not request substantive review of the abstention decision but only a determination whether the entry of an abstention-based remand amounted to an abuse of judicial power. *See Allied Signal Recovery Trust v. Allied Signal Inc.*, 298 F.3d 263, 270 (3d Cir. 2002); *In re Dow Corning Corp.*, 113 F.3d 565, 569 (6th Cir.),

cert. denied, 522 U.S. 977 (1997). Petitioners, however, seek substantive review of the remand order.[4] The *Waco* doctrine is inapt because it only permits review of remand orders to the extent they resolve substantive merits issues that would have preclusive effect on the post-remand litigation in state court. *See City of Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140, 143 (1934). This case obviously does not implicate the *Waco* doctrine.

2. The Petition does not raise a question concerning the Supremacy Clause. The discussion in Section III (*see* Opp. Br. at 10-11) is irrelevant.

3. Respondents next contend that because the right to removal is a statutory procedural right created by Congress, it is "subject to the established rule that there is no vested constitutional right to a mode of procedure." (Opp. Br. at 13) Respondents again misapprehend Petitioners' position. As the passage Respondents quote from *Doleac* reveals, the cases that address whether there is a "vested constitutional right to a mode of procedure" all concern due process. (*See id.*) This is not a due process case, it is an Exceptions Clause case. Rights afforded to individuals by due process are not coextensive with the limitations imposed on Congress by the Exceptions Clause. Different constitutional provisions that are addressed to different concerns are analyzed differently. *See Crowell v. Benson*, 285 U.S. 22, 45-54 (1932) (distinguishing the analysis of due process and Article III-based claims, even though they arose from the same set of core facts).

4. The suggestion that *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), *overruled in part by Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), somehow may permit review here is also mistaken. That decision construed 28 U.S.C. § 1447(d) – not 28 U.S.C. § 1334(d) as Respondents contend (*see* Opp. Br. at 8) – and concluded that substantive review of remand decisions is forbidden unless remand is based on an extra-statutory factor. *See Thermtron Prods.*, 423 U.S. at 351-52. By its terms, the principle underlying *Thermtron Products* is inapplicable here, where Petitioners seek substantive review of the abstention order.

Respondents are also wrong to assert that, by virtue of its power to create a statutory right to removal, Congress has "plenary power" to limit appeals to this Court. (*See* Opp. Br. at 11-12.) The argument proves too much. Congress has plenary authority to create statutory causes of action and procedural rules in all areas in which it legislates. Yet one cannot plausibly argue that Congress has "plenary power" to withdraw the Supreme Court's appellate jurisdiction in *all* of these instances. Recognition of such authority would allow Congress to withdraw completely this Court's appellate jurisdiction and thus give currency to the observation that the "Exceptions will swallow the rule." As in other areas of constitutional law, the "greater" power here does not include the "lesser." *See, e.g.*, *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002). Just because Congress may have plenary power to *create* procedural rights does not confer upon it absolute license to *withdraw* them from this Court's appellate jurisdiction once they have been created.

4. Turning to the Exceptions Clause (*see* Opp. Br. at 14), Respondents make two basic assertions. First, they contend that the history of Congress's legislation shows that it has had plenary power over this Court's appellate jurisdiction. (*See id.* at 15-16.) Second, they posit that this Court itself has held that Congress enjoys this sweeping power. (*See id.* at 16-20.) Both contentions are incorrect.

So long as it remains the province of the judiciary "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), particularly on the subject of the Constitution, Acts of Congress must give way. *See id.* at 176 ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."); *see also United States v. Morrison*, 529 U.S. 598, 616 (2000) ("Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace."). The mere fact that legislation has survived for many years does not immunize it from constitutional scrutiny.

See, e.g., *INS v. Chadha*, 462 U.S. 919, 941-42 & n.13, 959 (1983) (striking down legislative veto, which Congress had been enacting for fifty years). The history of Congressional enactments cannot, therefore, settle the issue.

In all events, historical trends support Petitioners' reading of the Exceptions Clause. For instance, Respondents mistakenly characterize the grant to this Court in 1802 of jurisdiction in federal criminal cases "where the judges of the circuit court were divided on a question of law" (*see* Opp. Br. at 15) as an exercise of the Exceptions power. In truth, this was an exercise of Congress's power to *regulate* this Court's appellate jurisdiction, *see* U.S. Const. art. III, § 2, cl. 2, and this particular exercise comports perfectly with Petitioners' understanding of the Exceptions Clause, because it preserves this Court's ability to ensure uniformity in federal criminal law.[5] The other evidence adduced by Respondents, construed most favorably to their stance, bespeaks a constant expansion of this Court's appellate jurisdiction over time. This supports the view that there in fact is a developing consensus that all questions of federal law decided by Article III courts must in some way have the opportunity to reach this Court.

Respondents' reading of case law (*see* Opp. Br. at 18-19) was anticipated in the Petition. As explained there, the broad pronouncements in some of this Court's decisions must be tethered to the controlling facts therein presented. Otherwise, taken to their logical conclusion, those pronouncements would recognize a plenary power to control this Court's appellate jurisdiction that Congress clearly does not possess, and cannot

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5. Whereas an "exception" completely forecloses this Court's ability to review a case or question, "regulation" merely affects the mode in which the case may reach this Court's docket and the manner in which this Court may exercise its appellate jurisdiction. Thus, contrary to Respondents' supposition (*see* Opp. Br. at 16), Congress's provision for certiorari jurisdiction does not constitute an "exception" but a "regulation," because such jurisdiction does not at all forbid this Court's review of any classes of cases.

possess if this Court properly is to fulfill its constitutional responsibility of ensuring the uniformity in interpretation of federal law.[6]

5. Respondents' assertion that neither *Mangus v. Miller*, 317 U.S. 178 (1942), nor *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940), "involved abstention in the context of bankruptcy-related cases" (*see* Opp. Br. at 20-21) is frivolous. The legislative history of 28 U.S.C. § 1334(c)(1) – the bankruptcy abstention statute here relevant – identifies the paradigm for abstention as follows: "'The [discretionary abstention] subsection recognizes the exigencies that arise in such cases as *Thompson v. Magnolia Petroleum*, 309 U.S. 478 . . . (1940), in which it is more appropriate to have a State court hear a particular matter of State law.'" *In re Pan American Corp.*, 950 F.2d 839, 846 (2d Cir. 1991) (alteration in original) (quoting H.R. Rep. No. 95-595, at 446 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6401). As the Second Circuit recognized, § 1334(c) "codifie[s] *Magnolia Petroleum*." *Pan American*, 950 F.2d at 846. Because Congress intended for "statutory" abstention to mimic "non-statutory" abstention doctrine, Respondents' attempt to distinguish between "statutory" and "non-statutory" abstention (*see* Opp. Br. at 21-22) *a fortiori* fails. The cases cited by Respondents (*see id.*) do not stand for a contrary proposition; the reason why abstention was deemed unreviewable in those cases was because, unlike 28 U.S.C. § 1447(d) (which was the statute at issue in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), and from which abstention-based remand orders are exempt, *see id.* at 711-12), 28 U.S.C. §§ 1334(d) and 1452(b) specifically prohibit review of abstention orders.

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6. Respondents are also incorrect to assert that Petitioners advocate limiting the exceptions power to precluding review of questions of fact. (*See* Opp. Br. at 16.) Congress may prohibit review of questions of law, but they must be done in a manner that is neutral with respect to legal content, such as amount-in-controversy limitations.

6. The final quiver in Respondents' bow is that this Court should forego review because the case has advanced in state court. (*See* Opp. Br. at 22-23.) The point is factually incorrect and legally irrelevant. Respondents do not, and cannot contend, for example, that the controversy is moot. Relief for Petitioners will be timely, moreover, because the litigation in state court is only in its preliminary stages, with discovery tracking the multidistrict litigation in the Southern District of New York (where this action should have been transferred in the first place (*see* Petition at 2-8)). The constitutional question here presented is ripe for immediate consideration and decision.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, Petitioners respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

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